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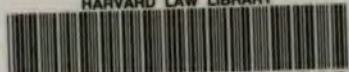
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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION,
APRIL TERM, 1890;
FOR THE
EASTERN DIVISION,
SEPTEMBER TERM, 1890;
AND FOR THE
MIDDLE DIVISION,
DECEMBER TERM, 1890.

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

VOLUME V.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

JACKSON, APRIL TERM, 1890.

LANCASTER MILLS v. MERCHANTS' COTTON-PRESS COMPANY AND OTHERS.

(*Jackson.* June 7, 1890.)

1. COMMON CARRIER. *Effect of the exemption from loss by fire.*

Common carrier, protected by a valid stipulation in his bill of lading against liability for loss of goods by fire, is not responsible for any loss resulting from that cause, unless his negligence was the proximate cause of the fire. (*Post*, pp. 31, 32.)

Case cited and approved: *Railway Co. v. Manchester Mills*, 88 Tenn., 653.

2. SAME. *Same. Pleadings in suit for such loss.*

Hence a bill states no cause of action which merely avers loss by fire of goods intrusted to carrier for shipment under bill of lading containing a valid clause exempting him from liability for loss by fire. Complainant must, in such case, aver the additional fact, which he must

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establish by proof, that the carrier's negligence was the proximate cause of the fire causing the loss. (*Post*, pp. 31, 32.)

3. SAME. *Same. No relief granted upon such bill taken for confessed.*

Upon such defective bill no relief can be awarded, even where there is prayer for general relief and the carrier suffers decree *pro confesso*. (*Post*, p. 32.)

Cases cited and approved: *McGavock v. Elliott*, 3 Yer., 374; *Ross v. Ramsay*, 3 Head, 16.

4. SAME. *Construction of clause exempting from liability for loss by fire.*

A valid stipulation in a bill of lading exempting carrier from liability for loss of cotton by fire "while at depots, stations, yards, landings, warehouses, or in transit," exempts him from liability for loss thereof by fire, occurring without fault of himself or agent, while the cotton is in warehouse for compression by his agent—the warehouseman. (*Post*, p. 31.)

5. SAME. *Validity of the fire clause exemption.*

Prima facie a fire clause exemption is valid and supported by sufficient consideration when it is found in a through bill of lading wherein through freight rates are granted over two or more distinct carrier lines. (*Post*, p. 31.)

Case cited and approved: *Railway Co. v. Manchester Mills*, 88 Tenn., 653.

6. WAREHOUSEMAN. *Measure of responsibility. General rule.*

A warehouseman, being a mere bailee for hire, is held, with reference to goods deposited for storage and performance of labor upon them, to ordinary care and diligence only, which is correctly defined as "the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances, or that which business men experienced and faithful in the particular department are accustomed to exercise when in the discharge of their duties." (*Post*, pp. 33-35.)

Case cited and approved: *Waller v. Parker*, 5 Cold., 477.

7. SAME. *Liability for loss by fire.*

A warehouseman is not, in the absence of special contract, responsible for goods destroyed by fire while in his custody for storage and the performance of labor upon them unless his negligence was the proximate cause of the fire that caused the loss. (*Post*, pp. 35, 36.)

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8. SAME. *Same. Defective pleading.*

And in a suit to charge him for such loss the plaintiff must aver in the pleadings, and the burden is upon him to prove, that the warehouseman's negligence was the cause of the fire from which the loss resulted. (*Post*, pp. 36, 37.)

Cases cited and approved: *Railway Co. v. Manchester Mills*, 88 Tenn., 653; *Runyan v. Caldwell*, 7 Hum., 134.

9. SAME. *Fact of loss by fire no proof of negligence.*

The mere fact that goods in custody of a warehouseman were destroyed by fire affords, of itself, no presumption of his negligence. (*Post*, p. 36.)

Case cited and approved: *Railway Co. v. Manchester Mills*, 88 Tenn., 653.

10. SAME. *Causal connection between negligence and loss essential.*

To charge even a negligent warehouseman with value of goods destroyed by fire while in his custody, it must appear that there was causal connection between his negligence and the fire. (*Post*, pp. 35, 36.)

11. FIRE INSURANCE. *Obligations of carrier and warehouseman with reference to insurance. Case stated.*

A railway carrier contracted with a warehouseman to receive for it from customers, and compress, all cotton designed for shipment over its line from a named depot. It was stipulated further that the warehouseman should insure the cotton in solvent companies for the benefit of the carrier while it remained in the warehouse.

The course of business pursued under this contract was as follows: The carrier gave to its customers permits authorizing the warehouseman to receive cotton as its agent. Upon deposit of the cotton under these permits the warehouseman gave to each customer a "dray ticket" therefor. Upon the face of some of these tickets it was stated that the cotton was "fully covered by the policies of insurance" held by the warehouseman, and in others that it was "covered by" the warehouseman "with insurance for the owners as interest may appear." The warehouseman uniformly made verbal representations to customers that their cotton was "fully insured" for benefit of carrier and owners. Upon presentation of this "dray ticket" the customer received bill of lading from carrier in lieu thereof. Under that bill of lading the carrier was exempted from liability for loss of the cotton by fire while it was in the warehouse for compression. Loss of the cotton by fire occurred, without negligence of carrier or warehouseman, while it remained in warehouse for compression. The warehouseman had not covered it with insurance as stipulated with carrier or as represented to customers. (*Post*, pp. 25, 26.)

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Held: Carrier is not liable; and that warehouseman is liable, but not as an *insurer* against loss by fire. (*Post*, pp. 39, 40.)

12. SAME. *Same*. *Contract of warehouseman with customer, how ascertained.*

And that the contract and true relations between the warehouseman and depositors of cotton should be ascertained from a view of the entire series of transactions considered as one whole, and not alone from the face of the "dray tickets." (*Post*, pp. 40-43.)

13. SAME. *Same*. *Effect of surrender of dray ticket to carrier.*

And that therefore the surrender of the "dray tickets" to the carrier, and acceptance of bills of lading in lieu thereof, did not end the warehouseman's obligations to depositors with reference to carrying insurance for their benefit. (*Post*, pp. 40-43.)

14. SAME. *Same*. *Warehouseman's contract construed.*

The warehouseman's contract with depositors was to *carry* insurance in solvent companies to cover their cotton, not to stand himself as insurer against loss by fire; and therefore his liability is not direct and absolute, as that of an insurer, but only for loss or damage resulting to depositors from his failure to comply with his contract or representations as to the *carrying* of insurance for their benefit.

15. SAME. *Same*. *Carrier's power as to insurance.*

A carrier has such insurable interest in goods intrusted to him for carriage that he may insure not only his *interest* or his *liability*, but the whole value of the goods. And in such case he may collect the whole value, and, re-imbursing himself for his special loss, he will hold the surplus in trust for the owners. (*Post*, p. 45.)

Cases cited and approved: 93 U. S., 541; 133 U. S., 409.

16. SAME. *Same*. *Insurance for carrier's benefit inures to owners, when.*

Insurance for the benefit of a carrier upon the goods in his custody, not limited to an insurance of his *liability* or his *interest*, is an insurance of the whole value of the goods, and one in which the owner has an interest. (*Post*, p. 45.)

Cases cited and approved: 93 U. S., 527; 133 U. S., 409; 1 Ell. & Ell., P. B., 652.

17. SAME. *Same*. *Parol evidence not admitted to limit effect of contract.*

And parol evidence is not admissible, in the absence of ambiguity, to show that such insurance was intended to cover less than the whole value of the goods. (*Post*, p. 46.)

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Cases cited and approved: 93 U. S., 527; 133 U. S., 418; 36 Md., 398; 66 Md., 339.

18. SAME. *Same. Warehouseman's contract to insure construed.*

The warehouseman's obligation is to take out insurance upon the entire value, and not upon the *liability* or *interest* of the carrier only, where he agrees to receive and compress cotton for shipment by the carrier, "as well as to insure the same while in his keeping for the benefit of the" carrier. (*Post*, pp. 19, 20, 47.)

19. SAME. *Same. Carrier not liable for warehouseman's default.*

But the carrier is not liable to the owner for the warehouseman's default in failing to procure such insurance where he was under no obligation to have the owner's interest insured. (*Post*, pp. 50-52.)

20. SAME. *Same. Statements of warehouseman not binding upon carrier.*

And the warehouseman's representations to depositors that such insurance had been procured, or his promise to them that it should be taken out, are not binding upon the carrier. He is not, in that matter, the carrier's agent. (*Post*, p. 54.)

21. SAME. *Same. Policy construed.*

Warehousemen's policy of insurance, covering "all cotton in bales received by them as agents for the benefit of railroads, transportation lines, or owners," effects insurance of the *cotton itself*, and, though intended primarily for the carrier, will inure to the benefit of the owners also. (*Post*, p. 48.)

22. SAME. *Same. Warehouseman's duty when loss occurs.*

When loss has occurred under a policy taken out by a warehouseman covering goods of his depositors, he becomes trustee for the owners, and must make proofs of loss and institute necessary proceedings for collection.

23. SAME. *Measure of damages for breach of contract to carry insurance for another.*

Warehouseman agreed to *carry* insurance for benefit of owners and carrier, covering cotton deposited with him for compression for shipment. He received cotton valued at \$698,300, but carried only \$301,750 insurance. There was total loss by fire without his or the carrier's fault. The owners sued the warehouseman for breach of his contract to *carry* insurance, making the carrier a co-defendant. (*Post*, pp. 55 et seq.)

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Held: That complainants were entitled to recover of the warehouseman such damages as resulted from breach of his contract to carry insurance, but not entitled to hold him as an insurer. (*Post*, p. 59.)

24. SAME. *Same. Effect of owner's taking out insurance.*

But the owners, having taken out for themselves the very insurance which the warehouseman had contracted to procure for them, and having received payment of loss in full from their own insurer, are entitled to recover nothing, having sustained no damage by reason of the warehouseman's default. (*Post*, p. 55.)

25. SAME. *Same. Transaction amounting to payment of loss.*

That is *payment of a loss*, and not a mere *loan of money*, where the insurer advances to the assured the value of the goods destroyed, taking an obligation that the money shall be repaid if the assured shall recover his loss of the carrier. (*Post*, pp. 56, 57.)

Cases cited and distinguished: 129 U. S., 129; 5 Ch. Div. Law Rep., 569.

26. SAME. *Rights of insurer paying loss.*

But if the loss be one that should be borne primarily by the carrier or warehouseman, as between them and the owner's insurer, then the latter is entitled to be substituted to the assured's rights, upon payment of the loss, and to proceed, in his name, to make collection. (*Post*, p. 58.)

Case cited and approved: Railway Co. v. Manchester Mills, 88 Tenn., 653.

27. SAME. *Construction of policy.*

A policy insuring "goods on shore prior to shipment" covers cotton in warehouse for compression for shipment by a railway carrier. (*Post*, p. 55.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
B. M. ESTES, Ch.

TAYLOR & CARROLL, H. C. WARRINER, and C. W. FRAZER for Lancaster Mills.

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METCALF & WALKER and TURLEY & WRIGHT for
Merchants' Cotton-press Company.

HOLMES CUMMINS for Railway Company.

STATEMENT OF CASE.

This is one of a series of suits involving the liability of the compress company and various railroad companies for the loss of 14,000 bales of cotton, valued at \$700,000, burned on the night of November 17, 1887, while in press No. 4 of the defendant compress company, at Memphis, Tenn. This particular suit is brought by the complainant, a Massachusetts cotton-spinning corporation, to recover the value of 413 bales of cotton, the defendants being the Merchants' Cotton-press and Storage Company, a Tennessee corporation, and the Newport News and Mississippi Valley Railroad Company and the Indiana, Bloomington and Western Railway, both being non-resident railroad companies. There was a decree *pro confesso* against the latter company, and a final decree fixing its liability as subordinate to that of both the other defendants; and from this decree it has not appealed. There was likewise a decree for the full value of the cotton owned by complainant against the other two defendants, the liability of the compress company being decreed as primary, and that of the Newport News and Mississippi Valley Company as secondary. From this decree each has ap-

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pealed, and they will hereafter be referred to as the appellants.

The bill is filed under the enlarged statutory jurisdiction of the Chancery Court. The case, as stated in the bill, is this: That complainant purchased at Memphis, Tenn., through Wm. Bowles & Sons, cotton brokers, on November 16, 1887, 413 bales of cotton, of the value of \$22,037.88, which, on that day, were delivered to the compress company—a firm engaged in warehousing, compressing, and insuring cotton for its customers—for compression and delivery to the Newport News and Mississippi Valley Company, to be delivered to the Indiana, Bloomington and Western Railway Company, “and under an agreement made both with the railway and Wm. Bowles & Sons that the same should be insured by the said cotton-press and storage company until it was in fact delivered, compressed, on board the cars of the said railway.” It is then charged that on the same day the Indiana, Bloomington and Western Railway issued its bill of lading, by which it recited that it had received said 413 bales of cotton, to be delivered at Clinton, Mass. This bill of lading is made an exhibit to the bill.

The second clause therein stipulates that “neither this nor any other carrier shall be responsible for any loss or damage to said property by fire or flood while at depots, stations, yards, landings, warehouses, or in transit.”

The third clause provides that each carrier whose

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line is used to make the transportation shall be liable only for loss or damage on its own line.

By the sixth clause it is stipulated that "any carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for unavoidable delays in procuring such compression."

The bill then proceeds to charge that on November 17, 1887, the day after its receipt by the compress company, it was, before compression, totally destroyed by fire, while in compress No. 4; that complainant "is informed and believes, and upon information charges, that when said 413 bales of cotton were destroyed, they were insured to their full value, under a contract with the compress company made with the Newport News and Mississippi Valley Company, whereby said cotton-press and storage company, in consideration that the said railroad company would pay it the sum of about fifty cents for each bale of cotton, to cover compressing, insurance, and loading on board of its cars, it would insure all the cotton carried over the line of said railroad to its full value, for the benefit of the owner thereof and the railway, from receipt in the compress till actual delivery on board the cars of the carrier."

It is further charged that when said cotton was destroyed "it was covered by the contract of the compress company, as insurers, to the full value

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thereof, as fully and completely as though said company had issued to the complainant a policy of insurance covering the risk while the same was in the custody of that company;" that it is advised that the contracts made with Bowles & Sons, to protect said cotton against loss from its receipt until delivery to the carrier, "and with the railway company, inures to its benefit, and that it can enforce the same in this Court, especially as the Indiana, Bloomington and Western Railway is a non-resident incorporation and insolvent, and the Newport News and Mississippi Valley Company declines and refuses, though requested, to institute suit for the benefit of complainant, although its contract was made with the cotton-press company to protect complainant's loss, and did protect it."

"Complainant further shows to the Court that when said 413 bales of cotton were destroyed the Merchants' Cotton-press and Storage Company had either re-insured its own risks, or taken out insurance for the benefit of owners, to an amount exceeding \$300,000, in about forty solvent companies, the names of which it has never disclosed, and which have in no authenticated way appeared."

The bill then charges that the cotton so destroyed was covered with the insurance so alleged to have been taken out by the compress company; that same was for the benefit of owners, "and that any excess over and above the insurance which had been taken out by the defendant cotton-press company it is bound to pay, unless there is double

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insurance; and, in that event, it is bound to pay its proportionate amount thereof. It is but a trustee of the insurance of the cotton for the owners."

The bill then shows that complainant had a running policy of insurance issued to it by the Insurance Company of North America.

"That company claims that the risk under its policy did not attach until an actual delivery on the cars of the carrier for transportation, and that the purpose and intent of the Merchants' Cotton-press and Storage Company, the carriers and shippers, was to insure the risk from the receipt of the cotton in compress No. 4 until it was laden aboard the cars of the carrier, when the risk attached under the running policy aforesaid.

"In accordance with this view, the said insurance company has declined to pay, as a loss under its policy, but has advanced the amount thereof to the complainant until its liability is determined by suit.

"Complainant is advised that, inasmuch as by a contract between the carrier and cotton-press company the latter insured said 413 bales of cotton to its full value, it is entitled to recover on that account in precisely the same way it would be entitled to recover had the carrier taken out in an insurance company insurance covering said 413 bales of cotton while in the custody of the cotton-press company; and, being entitled to recover said amount, the insurance company which issued to it the run-

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ning policy aforesaid insists that it is subrogated to whatever rights complainant has in the premises, and therefore declines to pay as for a loss under its policy.

“Complainant is advised that the right of recovery of the carrier under the contract aforesaid is clear; that it is entitled in equity to the benefit of the contract, the proceeds standing in lieu of the 413 bales of cotton; and that, inasmuch as it can enforce the collection thereof, and that said contract is in writing, and in the hands of the defendant, the Merchants' Cotton-press and Storage Company, or a copy thereof, it asks that the same be filed with its answer.

“And if mistaken in this view, it is advised that it is entitled to recover the full value of the insurance under the contract made with Wm. Bowles & Sons, the agents of complainant, by which, in consideration that the cotton be intrusted to the cotton-press company, it would insure the same, from receipt to actual delivery, for full value for the owners. And if mistaken in this view of the case, complainant insists it is entitled as owner to share in the insurance effected by the defendant cotton-press company, to the amount of \$300,000, for the benefit of owners of cotton, and which covered its 413 bales of cotton when they were destroyed by fire, and it is entitled to have the defendant cotton-press company declared a trustee thereof, and directed to pay the amount thereof out of the collections which it has made and will

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hereafter make from said insurance companies, its ratable proportion thereof."

This bill concludes with a prayer for a money decree against the compress company, and that it file list of its policies of fire insurance, and disclose what steps it has taken to collect same; that "the carrier defendants answer and disclose the contract between them, whereby the said 413 bales of cotton were to be delivered after compression to the Newport News and Mississippi Valley Railroad; and that the Indiana, Bloomington and Western Railway Company file with its answer the receipt which the compress company gave to it in exchange for the receipts which its agent, J. C. Rogers, delivered to that company, the same which were delivered to him by the said Wm. Bowles & Sons; and that the Newport News and Mississippi Valley Company file its written contract with the Merchants' Cotton - press and Storage Company, or a copy thereof, by which it agrees to transport compressed cotton only, and to pay a fixed sum on each bale of cotton to cover the insurance, to the full value thereof, compression and lading aboard the cars, to the said Merchants' Cotton-press and Storage Company; and that upon the facts of this case complainants may have all such general relief and special relief as may be proper."

The compress company in its answer admits receipt of cotton, and that it was burned as charged, but disclaims all negligence. It denies

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that this cotton was received to be delivered to the Indiana, Bloomington and Western Railway Company, or that it was delivered under any agreement with the railroad company, or with Bowles & Sons, that it should be insured by it until delivery on the cars of the railroad company. It denies that it in any manner, or to any extent whatever, agreed to become the insurer of said cotton, or to stand in the attitude as if it had issued a policy of insurance thereon. It denies that the contracts evidenced by its dray tickets issued to Bowles & Sons insured to the benefit of complainant. It insists that when the bill of lading was issued to complainant, that these dray tickets were surrendered to the railroad company and canceled, and that thereafter no further liability under the contract therein evidenced existed against it. It avers that it never had any other relations with complainant than that of warehouseman, and avers that complainant had full insurance of its own on said cotton, and has been fully paid and indemnified for said loss.

It denies any contract whatever with the Indiana, Bloomington and Western Railway Company, but admits that it did have a contract with the Newport News and Mississippi Valley Company, and files copy with its answer, but denies that it covered the cotton referred to in the bill. The compress company then set out what they state to be the usual course of business between itself and the shippers of cotton. Among other things, stat-

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ing that before the cotton of a shipper will be received into its press, that such shipper must obtain a permit from the carrier over whose line he expects to ship such cotton; that upon receipt of cotton by the compress, with permit, receipts for the same are issued to the shipper; that the shipper then delivers these receipts to the carrier and takes bill of lading, the dray ticket receipts of compress company being surrendered to carrier in order to obtain bill of lading; that the carrier then surrenders such receipts to defendant, and a receipt is issued by defendant to the carrier. It admits procurement of insurance in the sum of \$301,250 in solvent companies, in which respondent was named as the assured in the following form: "On all cotton in bales received by them as agents for the benefit of railroad transportation lines or owners, in the boundaries of the Merchants' Cotton - press and Storage Company, West Navy Yard Compress, situated and bounded, as follows: East by the west line of Fulton Street; west by the Mississippi River; north by Auction Street; south by Market Street, Memphis, Tennessee. The liability of the insurers is to begin on the receipt of said cotton on the premises of the assured as herein described for compressing, and is to cease and terminate when removed from the platform of the Merchants' Cotton-press and Storage Company for transportation." It files these policies in Court, and insists that it is under no obligation to collect same, the insurers refusing to pay ex-

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cept in so far as cotton was burned belonging to buyers who had no other insurance, and who had no bill of lading; that the insurers had admitted a liability to such owners, and had paid the sum of \$52,472.26 for their use.

The answer proceeds to state the insurance obligation of the respondent, as it claims to have understood it, stating, among other things, that "the primary purpose of respondent was to perform and fulfill its contract with the carrier by insuring, for the benefit of the carrier, cotton delivered to respondent, as agent of the carrier, so long as the actual custody thereof by respondent should continue. Additionally to that general purpose, and solely for the convenience of the owners, the respondent voluntarily, and without any consideration whatever paid or promised to be paid, undertook to insure the owners, who had no other insurance, and to whom no bill of lading had issued." It insists that the written parts of the policies obtained by it are to be read and understood in the light of this purpose and of its contract with the railway lines. It insists that its only obligation to owners was to carry insurance to cover owner's interest up to issuance of bill of lading who had no other insurance.

The Newport News and Mississippi Valley Company answer and say that it did agree with J. C. Rogers, agent of the Indiana, Bloomington and Western Railway, and with the compress company, on November 10, 1887, that 300 bales of cotton,

to be shipped by Bowles & Sons, should be compressed at defendant compress company's press No. 4, on the tracks of respondent; and again, on November 12, 1887, it further agreed that 600 other bales, to be shipped by said Bowles & Sons, should be compressed at same press. "At the time of making said agreement said Rogers agreed with respondent and defendant compress company that said cotton should be shipped from Memphis, over the railway of this respondent, to Louisville, on respondent's road, and thence over connecting roads to the line of said Indiana, Bloomington and Western Railway;" that "it was understood and agreed between defendant compress company, defendant Indiana, Bloomington and Western Railway Company, and respondent, in said contracts of November 10 and 12 mentioned, * * * that said cotton so to be compressed for said Wm. Bowles & Sons, and then to be shipped over respondent's road, were to be accepted by defendant compress company, under its contract with respondent for compressing, etc., all cotton respondent might have at Memphis for shipment."

The said railway company then admits said cotton to have been burned before compression, as alleged, and avers that it is advised "the same was or should have been fully insured by defendant compress company, under its said contract with defendant above mentioned, and that, to the extent that same was insured, the compress company is a trustee for the owners, and liable, as an insurer

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itself, for any value thereof not satisfied by such outside insurance.

It files this answer as a cross-bill against the compress company for the purpose of setting up its contract with the compress company, that complainant may have the benefit thereof, so far as in equity it may be entitled to the benefit thereof, and for the purpose of recovering freight moneys to which the railway company is entitled, and which it avers was or should have been covered by said insurance.

It was shown that this compress company had contracts with each railway line entering Memphis, and with a number of transportation lines and foreign railways having no line of their own, or none entering Memphis, but which contracted for freight with expectation of using one of the Memphis roads as the initial carrier. These contracts were in substance identical with that with the Newport News and Mississippi Valley Company, which was in the following language:

COPY OF CONTRACT BETWEEN THE COMPRESS COMPANY AND THE
NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY.

THIS AGREEMENT, Made on the fifteenth day of November, A.D. 1886, by and between the Newport News and Mississippi Valley Company, hereinafter termed the party of the first part, and the Merchants' Cotton-press and Storage Company, of Memphis, Tennessee, hereinafter termed the party of the second part, and witnesseth as follows:

First.—All cotton which the said first party may desire to compress at Memphis, during the term of this agreement, shall be compressed by the second party alone, who shall also warehouse the same such time as may be required, and load the same, after being compressed, on the cars of the first party, as well as shall insure the same while in his keeping for the

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benefit of the first party, and the price to be paid therefor by said first party shall be at the rate of twelve and one-half ($12\frac{1}{2}$) cents per one hundred (100) pounds, bill of lading weights for all such cotton so compressed, etc., on and prior to the thirty-first day of August, 1887, and ten (10) cents per hundred (100) pounds, bill of lading weights, for all cotton compressed, etc., thereafter during the term of this agreement. This compensation covers compressing, loading in cars, and insurance, as well as the use of the second party's grounds, sheds, platforms, and all services rendered by said second party in and about such cotton delivered it hereunder until the same is delivered to and loaded on the cars of the first party by said second party.

Second.—Such compressing and loading on the first party's cars is to be done by the second party promptly, and such cotton shall be compressed so that the average lading shall be not less than twenty-six thousand (26,000) pounds per car of average size.

Third.—Such insurance shall be taken for the benefit of the first party in good and solvent companies, so as to cover any loss while such cotton is under the second party's control, and until loaded on the first party's cars.

Fourth.—The second party shall be liable for any loss arising from negligence or lack of care in anywise to such cotton while under its control, agreeing to be bound therefor as a bailee for hire; and for any such loss, shall pay the first party all damages and cost, or the first party may retain any dues to the second party to cover such loss. This, however, not to be limited to the amount of such dues.

Fifth.—The first party hereby constitutes the second party its agent to receive such cotton for it, and sign receipts on which bills of lading may be issued when cotton is delivered in compresses or grounds in the navy yard, alongside the tracks of the first party.

Sixth.—So far as it can legally so do, the first party agrees to establish no other compress agency nor employ any other compress to do its compressing of cotton at Memphis during the term of this contract.

Seventh.—In case, at any time during the term of this contract, the second party shall do for any other person the like service as herein agreed to be rendered the first party for a less rate than that above stipulated, then the first party shall pay no more than such lower rate for any compressing hereunder; and in case, during the term this contract is to run, any other compress company, organization, person, or corporation should establish other compresses at Memphis (called the Taxin; District of Shelby County), Tennessee, and do, or propose to do, compressing and the other services above agreed to be done by the second party at a lower rate than that above stipulated herein, having equal facilities therefor and proposing to do such compressing in good faith, then the second party agrees and binds itself thereafter, during the time such lower rate continues in force by such competitor, to render the services and do the things hereinabove stipulated, at such lower rate so offered or done by such

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other person, corporation, etc. However, if, and when such competitive or lower rate is withdrawn, then the rate hereinabove fixed shall again become in force.

Eighth.—All bills for compressing cotton shall be paid weekly.

Ninth.—Said compress company guarantees correct loading of such cotton in said first party's cars and the correctness of the loading list for same.

Tenth.—This contract is to continue in force until the thirty-first day of August, 1896, said rate of twelve and one-half ($12\frac{1}{2}$) cents per one hundred (100) pounds being for one year from the first day of September, 1886, and said rate of ten (10) cents per one hundred (100) pounds for the remaining nine years, and this contract is to relate back to the said first of September, 1886, and is to cover, as to its terms, all compressing of cotton done by the second party for the first party since that date.

Eleventh.—The contract heretofore made between the Chesapeake, Ohio and South-western Railroad Company and the second party above, of date the twenty-fifth day of August, 1884, is hereby abrogated and annulled.

And it is further agreed, and one of the terms of this contract, that the second party will compress cotton for the first party as rapidly as it is prepared to forward same, and in case of the second party's failure to so do at any time, the first party shall have further right to arrange with others for such service during the second party's failure aforesaid.

In witness of all of which, the said contracting parties have caused the names of their respective officials to be signed in duplicate hereto.

NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,

By JOHN ECHOLS, *Third Vice-president.*

MERCHANTS' COTTON-PRESS AND STORAGE COMPANY,

By NAPOLEON HILL, *President.*

The permits under which this cotton was received by the compress company were in the following words:

Ex. 2. Date, 11-12. Shipper, Wm. Bowles. No. bales, 600. What line, Nickle Plate No. 4. Rogers.

MEMPHIS, 11-12, 1887.

Merchants' Cotton-press and Storage Company:

Please receive at press No. 4 600 bales cotton. Issued on account Nickle Plate line.

NOTE.—Not transferable; must be used for the benefit of the shipper named, and void if not used within forty-eight hours after date.

W. R. MCINTOSH, *Div. Freight Ag't.*

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Upon delivery of cotton from drays into the press, receipts or tickets were issued, which varied somewhat in terms. The form used by Wm. Bowles & Sons was as follows:

No. 4616.

MEMPHIS, TENN., Nov. 11, 1887.

Received of Wm. Bowles & Sons by the Merchants' Cotton-press and Storage Company, and covered by them with insurance for the owners, as interest may appear, the following cotton, in good order, at press No. 4.

Dray.	Marks.	No. of Bales.
9	O—↑↑↑	Nine B—
	<L> K	Moffatt.

(On left margin, "For shipment via.")

(Across the face printed, "If held in the press over fifteen days before bill of lading issues, or if sold while in press, fifty cents per bale per month charges will be collected before delivery or shipment.")

To accommodate the various railway lines, compresses were erected with regard to convenience of each line, and upon the track of each line, so that cotton could be loaded from the platform of the compress into the cars of the carrier. The compress in which complainant's cotton was burned was one used by the Newport News and Mississippi Valley Company and by steam-boat lines, being on the river-bank and on the track of the railway. There was proof tending to show that the shipper of cotton usually, within twenty-four hours, delivered his dray ticket receipts to the carrier with whom he had made his contract of affreightment, and took from the carrier a bill of lading. In this case these dray tickets were delivered to the general freight agent of the Indiana, Bloomington and Western Railway, a company having no line into Memphis, and having no contract-

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ual relations with the compress company nor with the Newport News and Mississippi Valley Company. The Indiana, Bloomington and Western Company could use any of several northern or eastern lines to carry the cotton to its own line of road, prorating freight under a general understanding with such roads as made connection with its own. When it issued its bill of lading it gave notice to the compress company of this fact, accompanied with directions to ship over the Chesapeake, Ohio and South-western Railroad, this being the local designation of the division of road operated by the Newport News and Mississippi Valley Railroad between Memphis and Louisville, Kentucky.

This notice and shipping direction was in the form usually adopted by carriers at Memphis. Those used in this particular case were as follows:

No. 8. Merchants' Cotton-press and Storage Co., of Memphis:

MEMPHIS, Nov. 17, 1887.

I have this day issued on your dray receipts B. L. to Wm. Bowles & Sons for _____ bales cotton.

Marks.	No. of Bales.	Weight.
< L > K	214.	107,200
O ——— ††† 1—500		

Via Louisville and J. M. & I. Ry.

Ship the above cotton by the C., O. & S. W. R. R. for account of N. P. line. JOHN C. ROGERS, *Ag't*.

Part lot 500.

No. 9. Merchants' Cotton-press and Storage Co., of Memphis:

I have this day issued on your dray receipts B. L. to Wm. Bowles & Sons for 286 bales of cotton.

Marks.	No. of Bales.	Weight.
< L > K.		
1—500. O ——— †††		

Via Louisville and J. M. & I. Ry.

Ship the above cotton by the C., O. & S. W. R. R. for account of N. P. line. JOHN C. ROGERS, *Ag't*.

Balance 500.

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The proof tended to show that the great mass of cotton received at Memphis came direct from plantations, and were in usual commercial bales. By compression these bales were so reduced in bulk as to enable carriage of double the number of uncompressed bales in car or vessel of carrier. At the date of this transaction the defendant compress company was the only company engaged in compressing at Memphis. The carrier gave no rate save for uncompressed cotton, stipulating in bills of lading for right to have it compressed at expense of carrier. There was proof tending to show the system of requiring permits not to have been rigidly adhered to. It was not stipulated for in the contracts between the carriers and compress company, and seems to have been adopted as a means of keeping the compress clear of cotton not intended for immediate shipment. Permits were issued by the carriers upon application of any shipper, and without requiring the person obtaining them to agree to ship his cotton over the line of the railway issuing them. The permit was regarded as a mere indication of an *expectation* that the cotton would be shipped over line of company granting them, but not as obligating the shipper to do so.

Fourteen separate issues of fact, framed under direction of the Chancellor, were submitted to a jury called by defendants. These issues, together with the responses of the jury, were as follows:

First.—Under what express contract—written, printed, or verbal—if any, did the defendant, the Merchants' Cotton-press and Storage Com-

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pany, receive the cotton described in the bills in these causes, or any portion thereof? In response to this issue set out in full said contract.

For response to the first issue they find: That the defendant, the Merchants' Cotton-press and Storage Company, received the cotton under the following express written contracts:

1. The permits issued by W. R. McIntosh, the general freight agent of the Newport News and Mississippi Valley Railroad Company. (*Ante*, p. 20.)
2. The contract between said railroad company and the compress company. (*Ante*, pp. 18-20.)
3. Under the several dry tickets or receipts given Wm. Bowles & Sons for said cotton. (*Ante*, p. 21.)

Second.—Did said Merchants' Cotton-press and Storage Company assume any liabilities in respect of said cotton outside of the scope and terms of the express contract? If so, in what manner and upon what consideration, and what was the liability? Answer fully and specially.

In response to the second issue they find and answer: No.

Third.—If in response to the foregoing issues it is found that said Merchants' Cotton-press and Storage Company assumed a liability to carry insurance on said cotton, for whose benefit was said insurance to be carried, on what terms, and for what length of time?

In response to the third issue they find and answer: They assumed a liability verbally and according to terms of the written contracts to carry insurance for the benefit of railroads, transportation lines, or owners upon all cotton in bales while in their possession.

Fourth.—Who was the owner of said cotton at the time of the receipt thereof by said defendant compress company, and who was the owner when the bills of lading were given and at the time of its loss by fire?

In response to the fourth issue they find and answer: The Lancaster Mills at all three periods of time.

Sixth.—What was the aggregate value of all the cotton destroyed in compress No. 4 of the Merchants' Cotton-press and Storage Company on the seventeenth of November, 1887, or in consequence of said fire, and what was the aggregate amount of insurance effected thereon by defendant compress company?

In response to the sixth issue they find and answer: The aggregate value was \$698,300; the aggregate insurance, \$301,750.

Seventh.—What was the proximate cause of said fire, and what was the measure of the care and diligence of said Merchants' Cotton-press and Storage Company in using precautions against fire and in saving cotton from fire at and before the loss of the cotton, and did the Merchants' Cotton-press and Storage Company use such care and take such precautions to prevent and extinguish the fire? If not, in what respect did it fail?

In response to the seventh issue they find and answer: The jury are unable to determine from the evidence the immediate cause of the fire.

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As to the measure of care and diligence used in protecting and caring for the cotton as warehousemen, the jury are of the opinion that ordinary care and diligence was used in the warehouse proper, or up-stairs, both before and at the fire, the water supply seeming ample, and the engine and hose were handled with promptness and intelligence; but in the opinion of the jury the construction of the warehouse was faulty in some respects, especially in not being closed up on the west side, or river-front, below the level of the floor where cotton was held. The jury think this space or opening should have been closed up, or there should have been a watchman stationed under the warehouse or on the levee in front of the warehouse.

Eighth.—What was the custom or the mode of business in Memphis at and before said fire between shippers of cotton and compress companies touching the delivery of cotton to compress companies, and also to railroad companies over which it was to be shipped, especially in regard to dray tickets and insurance? Was this mode of business general or limited? and for what length of time prior to said fire had it been generally or specially in vogue in Memphis? Was such custom known by complainants or their agents?

In response to the eighth issue they find and answer: The custom was: (1) The buyer or shipper procured permits from the railroad company or common carrier to deposit cotton at any press designated by the common carrier; (2) to send the cotton on drays or wagons to such designated press, and receive for said cotton the receipt of the Merchants' Cotton-press and Storage Company for it. It was generally understood by buyers and shippers of cotton that it was fully insured by the Merchants' Cotton-press and Storage Company while the cotton was in their possession. This mode of business was general for several years previous to the fire. The general mode was known to the complainant's agents.

Ninth.—What were the relations, contractual or otherwise, between the defendant compress company and the defendant railroad company in regard to the receipt, compression, insurance, and shipment of cotton, the surrender of dray tickets and the issuance of bills of lading therefor; and under said relations as between themselves, at what point in the transaction did the liability of each for loss or damage by fire begin and end? If any such relations existed by express contract, written or verbal, set out clearly and in full said contract.

In response to the ninth issue they find and answer: None further than the contract set up in answer to the first issue, and also made part of this answer as Exhibit No. 1.

Tenth.—Did the complainant have any insurance in its own name or for its own benefit on said cotton at the date of its loss? If so, in what amounts, with what companies, under what character of policies, what, if any thing, has been paid or advanced to complainant on said policies,

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in what shape and under what arrangement or contract, and the present status of said insurance?

In response to the tenth issue they find and answer: It had insured in its own name at the date of the loss a policy covering the value of said cotton and 10 per cent. additional. We find the value of the cotton to be \$20,034.63, with 10 per cent. added, or \$2,003.46, making a total of \$22,038.09. Said policy was issued by the Insurance Company of North America. A copy of which policy is also hereto attached as Exhibit No. 1 to this answer, and made part hereof. It has received under said policy the sum of \$22,038.09 under a certain contract which is hereto attached as Exhibit No. 2 to this answer, and made part hereof.

Eleventh.—When the defendant compress company received complainant's cotton, were there any instructions to it, or contract, or understanding, that it was to be received by or shipped over any particular carrier line; if so, what line, and were these instructions or this contract or understanding communicated to said carrier line before the fire?

In response to the eleventh issue they find and answer: When the defendant compress company received the cotton of complainant, it was by permit issued by agents of the Newport News and Mississippi Valley Company for account of Nickel Plate Railroad, and defendant railroad company's agent—to wit, the Merchants' Cotton-press and Storage Company—was apprised of said understanding by reason of said permit, also by the shipping orders. Said permits are exhibited in answer to the first issue, and are also made a part of our response to this issue as Exhibits 3 and 4. Said shipping orders are made a part of this answer as Exhibits Nos. 1 and 2 hereto.

Twelfth.—How and on what representations were the bills of lading procured from the railroad company?

In response to the twelfth issue they find and answer: The bills of lading were procured on presentation and delivery of the receipts of the Merchants' Cotton-press and Storage Company on representation of complainant's agents that the cotton was in possession of said defendant compress company.

Thirteenth.—How long after the dray tickets were delivered to the railroad company before the fire occurred, and what shipping directions, if any, were given to that company when the tickets were received by it?

In response to the thirteenth issue they find and answer: The dray tickets were delivered to the railroad company on November 16, 1887, the date of bill of lading hereto attached as Exhibit No. 1 to this answer and made part hereof. The fire occurred on the night of November 17, 1887. Directions were given to ship over the Chesapeake, Ohio and Southwestern Railroad, as per shipping directions issued by J. C. Rogers on November 17, 1887, exhibited as Nos. 1 and 2 to our answer to eleventh issue; they are also made part of our answer to this issue as Exhibits 2 and 3.

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Fourteenth.—What representations, if any, were made by defendant compress company to complainants, or its agents, as to its liability for cotton destroyed by fire in its presses before the fire?

In response to the fourteenth issue they find and answer: The defendant compress company represented to the agent of the complainant that the cotton in their (the compress company's) presses was fully insured, as per contract already exhibited in answer to the first issue.

Fifteenth.—What became of complainant's cotton, if destroyed by fire on the seventeenth of November, 1887, in whose possession was it when destroyed, and what evidence of contract or duty on the part of either of the defendants did the complainant hold at the time, and how was it secured? Set out in response hereto said contract.

In response to the fifteenth issue they find and answer: The complainant's cotton was destroyed by fire on the night of the seventeenth of November, 1887, while in possession of the Merchants' Cotton-press and Storage Company. The evidence of contract or duty on part of defendant held by complainants was a bill of lading for the cotton destroyed, and was secured on delivering dray tickets issued by defendant compress company. Said bill of lading is exhibited as No. 1 in answer to the thirteenth issue, and is also made part of this answer as Exhibit No. 1 hereto.

OPINION OF COURT.

LURTON, J. This case has been very ably and elaborately argued, and we deem it not inappropriate to acknowledge our very great indebtedness to the learned counsel who have appeared in the cause.

The first question which we shall consider is as to the liability of the railway defendants for a breach of their obligation as carriers of goods. The decree of the Chancellor against them was predicated upon a supposed obligation by contract to cover with insurance the cotton of complainant. It has been, however, very much pressed upon us

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that the carrier is liable upon a wholly different ground—to wit, for a breach of duty and contract as carrier—and that its liability in this respect is primary and absolute, regardless of any special obligation to insure. A careful examination of the pleadings discloses no allegation of fact which, as matter of law, would entitle complainant to any decree against either railway company for a liability as carrier.

The primary object in making the railway companies defendants, as indicated by the form of the original bill and the relief especially prayed, seems to have been to reach the compress company through subrogation to the rights of the railway company having a contract with the former for insurance covering cotton while in its warehouse for compression.

The bill concludes with a prayer for general relief; and if the facts stated in the pleadings are such as would entitle complainant to other or different relief than that especially prayed, then, under well-settled rules of equity pleading, such other appropriate remedy may be granted. The facts which involve any question of direct liability of the railway defendants as carriers, which are stated in the bill, are, briefly, as follows:

First.—That the Newport News and Mississippi Valley Company had issued its permit for the admission of this cotton into the press designated for cotton intended for shipment over its line, on account of the Indiana, Bloomington and Western Railway, a connecting carrier.

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Second.—That this delivery to the compress company was for compression and delivery to the Newport News and Mississippi Valley Company as initial carrier, to be by it transported and delivered to the Indiana, Bloomington and Western Railway as a connecting carrier.

Third.—That the dray receipts of the compress company had been delivered to the Indiana, Bloomington and Western Railway, and its through bill of lading accepted for carriage of the cotton at through rate of freight from Memphis to Clinton, Massachusetts.

Fourth.—That the cotton was burned while yet in the actual custody of the compress company, but after issuance of bill of lading.

This bill of lading is made an exhibit to the bill, and contains, among other things, the following special stipulations:

First.—That any carrier over whose line the cotton may pass shall have the privilege, at its own expense, of compressing the cotton for convenience of carriage.

Second.—That the carrier shall have exemption from liability for loss or damage by fire “*while at depots, stations, yards, landings, warehouses, or in transit.*”

Third.—That each connecting carrier shall have the benefit of all the stipulations of the bill of lading.

Fourth.—That each connecting carrier shall be responsible only for loss or damage occurring on its own line.

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On these facts it may be assumed that while the actual custody of the cotton was with the compress company at time of the loss, yet, as between the owner and the railway line, there was a good delivery to the carrier under the bill of lading, which provided especially for compression, and which accepted delivery at the warehouse of the compress company as a delivery to it. Inasmuch as the Indiana, Bloomington and Western Railway was not a line having tracks entering Memphis, and inasmuch as the bill alleges a delivery was to be made by the compress company to the Newport News and Mississippi Valley Company for carriage and delivery to the Indiana, Bloomington and Western Railway as the company issuing bill of lading and as connecting carrier, it may be assumed that the liability of the Newport News and Mississippi Valley Company was precisely the liability of the Indiana, Bloomington and Western Railway, and that the cotton was held by the compress company for compression, for and on account of the Newport News and Mississippi Valley Company, and for delivery on its cars when compressed.

The liability of both the Indiana, Bloomington and Western Railway and the Newport News and Mississippi Valley Company is to be determined by the common law, except in so far as modified by valid stipulations contained in the bill of lading. The exemption from liability for loss by fire at any "depot, station, yard, landing, or ware-

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house" contained in bill of lading, is sufficiently comprehensive to cover a loss by fire in the warehouse of the compress company. In view of the stipulation for compression, before shipment, contained in the bill of lading, and the actual delivery by the shipper to the compress for compression, it would be unreasonable to hold that a stipulation for exemption while in "warehouse" did not cover cotton while warehoused for compression.

The validity of this fire clause is not questioned in the pleading, either by allegation that it was without consideration, or imposed by duress, or unreasonable for any cause. In such case, it appearing that it was contained in a through bill of lading, wherein a through rate was granted, for carriage over line of more than one carrier, it will be presumed that the stipulation was upon a sufficient consideration and reasonable. This exemption would, however, be invalid as a protection against a loss by fire the result of the negligence of the carrier or of its agent for compression. The bill fails to charge that the loss was due to any want of care, either upon the part of the carrier or of any of its agents or servants. Where, therefore, the pleadings show a valid stipulation for exemption from loss or damage by fire, and it is further shown that the failure of the carrier to safely carry and deliver was due to a loss by fire, no case is made against the carrier unless the fire be charged to have been the result of negli-

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gence. The burden of proof, when the loss is thus admitted to have been by fire, is upon the owner to prove negligence, and under plainest rules of pleading the plaintiff ought to allege in his pleading every fact necessary to fix liability. *L. & N. R. R. v. Manchester Mills*, 88 Tenn., 653.

We are therefore of opinion that, under the pleadings, no such facts are stated as would entitle complainant to any decree against either of the railway defendants for any breach of duty as carriers. The decree *pro confesso* against the Indiana, Bloomington and Western Railway did not authorize any final decree fixing liability upon it for this loss. No relief can be granted upon a bill in equity taken for confessed, beyond the fair scope of the allegations and prayer of the bill. *McGavock v. Elliot*, 3 Yer., 374; *Ross v. Ramsey*, 3 Head, 16.

The decree actually pronounced was based upon the supposed liability of that company under an obligation to insure, and not by reason of any breach of carrier duty. That decree is not before us for review, inasmuch as that company has not appealed; but as it is now sought to affect the defendants who have appealed, by reason of the assumed liability of the non-appealing carrier, we have felt it necessary to consider the weight to be attached to the decree against the Indiana, Bloomington and Western Railway.

Second.—Is the defendant compress company

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directly liable to complainant as for a breach of duty as warehouseman?

The seventh issue submitted to the jury involved the degree of care and diligence required to be exercised by the cotton-press company, with regard to precautions against fire and saving cotton from fire at and before this loss.

The jury were instructed upon this issue that "if you find that the defendant compress company held this cotton at the time of its destruction as warehouseman only (that is, for storage and compression without any superadded obligation, and in this connection you need not consider the question of insurance), then the law imposed on it as the measure of its duty, ordinary care, or, as specifically stated by an eminent law writer, 'the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances, or that which business men experienced and faithful in the particular department, are accustomed to exercise when in the discharge of their duties.' The warehouseman must erect a good building, reasonably suited and adapted for safe-keeping of the particular property intended to be taken care of (it need not be fire proof), and he must keep it watched in proportion to the risks he is subject to, and the value of the goods with which he is likely to be intrusted, having of course in view the position in which his building is to stand, and his capacity of thus burdening himself without incurring unjustifiable expense."

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They were further instructed that if they found any other duty was superadded by agreement or confidence, aside from insurance, that then they should report what such superadded duty was, and what degree or measure of care was imposed thereby, and that, in case of such superadded duty, the law imposed as the measure of care extraordinary diligence. The jury was likewise fully instructed as to the grades of diligence implied from the terms "ordinary care" and "extraordinary care."

The response of the jury to this issue, as defined by the charge quoted, was in the following words:

"In response to the seventh issue they find and answer: The jury are unable to determine from the evidence the immediate cause of the fire. As to the measure of care and diligence used in protecting and caring for the cotton as warehouseman, the jury are of the opinion that ordinary care and diligence was used in the warehouse proper, or upstairs, both before and at the fire, the water supply seeming ample, and the engine and hose were handled with promptness and intelligence; but, in the opinion of the jury, the construction of the warehouse was faulty in some respects, especially in not being closed up on the west side, or river-front, below the level of the floor where cotton was held. The jury think this space or opening should have been closed up, or there should have been a watchman stationed under the warehouse or on the levee in front of the warehouse."

The charge of the learned Chancellor was full and without error in defining responsibility of warehousemen. *Waller v. Parker*, 5 Cold., 477; Schouler on Bailments, Sec. 101.

The finding of the jury must be construed as a finding that the compress company was liable only as a warehouseman, and that neither by "agreement or confidence" had it assumed any other or higher responsibility than that of warehouseman for storage and compression. If it had assumed absolute responsibility for the safe-keeping of the goods, or direct liability for a loss by accidental fire, the jury should, under this charge, have reported such superadded duty or responsibility. Under the rule of ordinary care, this finding acquits the defendant of negligence, unless the defect in the building pointed out by the jury in some way was the proximate cause of the loss or contributed to the loss. We have carefully examined the very voluminous proof upon this question of negligence, and are entirely satisfied with the finding of the jury, and with the decree of the Chancellor holding that no negligence was established.

The defect in the building referred to by the jury does not appear to have in any way contributed to the loss, or to have been the cause of the fire. There is a total want of connection between the negligence and the injury. This want of causal connection is fatal to any demand that a decree should pass finding a loss by negligence. The rule, as we understand it, is that "the bur-

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den of proof is upon the bailor to prove the contract and the delivery of goods; then upon the bailee to show their loss and the manner of the loss. The burden then shifts to the bailor to establish that the loss was due to negligence." *Runyan v. Caldwell*, 7 Hum., 134; *L. & N. R. R. v. Manchester Mills*; Schouler on Bailments, Sec. 101.

Under this rule the burden of proof was upon complainant to show that this fire was the probable result of negligence. If this defect in construction of building can be shown to have been the proximate cause of the fire, or to have contributed to the loss, then the liability is made out; but the proof makes it absolutely certain that this fire did not originate from beneath the building—the exposed part—but that it originated upon the heads of bales of cotton standing on end upon the floor. At the time it was discovered it did not cover more than the heads of three bales. If it had appeared that the fire originated on the floor, or beneath the floor, then a connection between the defective and exposed building and the fire would have been rendered probable. The loss, therefore, was not, in the opinion of the Chancellor, attributable to this exposure of the under parts of the warehouse to the invasion of the tramp or the torch of the incendiary. In this view we agree with him.

The answer of the defendant compress company presents an issue of negligence which was wholly

unnecessary, in view of the failure of complainant to charge negligence. No presumption of negligence arises from the destruction by fire of goods in the hands of a bailee for hire. This we had occasion to consider at this term in *Railroad v. Manchester Mills, supra*. Therefore, a bill alleging a loss by fire of goods in hands of bailee should, in order to make an issue, charge such loss to have been by negligence. In view, however, of the fact that the answer presented an issue, and that the parties went to the jury upon the issue thus made in the answer, we have, without committing ourselves to the sufficiency of the pleading, treated the question of negligence as sufficiently raised, so far as the compress company is affected.

Third.—It is next insisted that under the facts of this case the obligation of the compress company is that of an insurer against loss or damage by fire; that its liability is not for a breach of obligation to take out insurance, nor for damage resulting from false representation that its policies were sufficient in terms and amount to cover owner's interest in all cotton while in its compress, but that it is liable as an insurer.

It may be assumed that the corporate powers of this defendant were ample to authorize it to contract with its customers that it would assume liability for any loss by fire, whether accidental or the result of its negligence. But did it do so? The contracts between the railway lines and the

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compress company explicitly negative any idea of such liability. These contracts require of the compress company that insurance for the benefit of the carriers should be taken "in good and solvent companies." The dray ticket receipts stated that the cotton was "covered by them with insurance for the owner as interest may appear." This form of dray ticket was not habitually used. The statement on these receipts varied, and shippers seem to have themselves dictated the terms in which this insurance obligation was stated. The following forms of dray receipts are shown to have been in use at the date of this transaction:

MEMPHIS, TENN., Oct. 20, 1887.

Received at the Merchants' Cotton-press and Storage Company No. 4, from Jones Bros. & Co., the following cotton in good order:

N. B.—It is agreed and understood that the cotton enumerated below is fully covered by the policies of insurance of the Merchants' Cotton-press and Storage Company, of Memphis.

Marks.	No.	Cotton Bales.
ETON	25	Twenty-five B. C.
Jones.		Cooper.
		Me. I.

MEMPHIS, TENN., ———, 188

Received of A. A. Paton & Co., by Merchants' Cotton-press and Storage Company, for compressing, and covered by them with insurance, the following cotton in good order at press No. ———:

If held in press over fifteen days before bill of lading issues, or if sold while in press, fifty cents per bale per month charges will be collected before delivery or shipment.

Oct. 21, 1887.

MEMPHIS, TENN., ———, 188

Received by the Merchants' Cotton-press and Storage Company, from E. L. Topp & Co., the following cotton in good order and condition, to be compressed:

If held in the press over fifteen days before the bill of lading issues, or if sold while in press, fifty cents per bale per month charges will be collected before delivery or shipment.

Oct. 22, 1887.

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MEMPHIS, TENN., 10-1887.

Received of C. E. F. Hall, Agent, in good order, the following cotton, marked as per margin, by ———.

MEMPHIS, TENN., 9, 28, 1887.

Received at the Merchants' Cotton-press and Storage Company No. 4, from Alsobrook, Bowling & Co., the following cotton in good order:

N. B.—It is agreed and understood that the cotton enumerated below is fully covered by the policies of insurance of the Merchants' Cotton-press and Storage Company.

Subject to storage and insurance if held in the press over fifteen days before bill of lading is issued. Not transferable without charges from date of receipt.

The voluminous proof as to "course of business," "general understanding," and "local custom" has been carefully examined, and we concur with the Chancellor in holding that there was no such uniformity in the "course of business" or concurrence in "general understanding" between the compress company and the buyers and shippers at Memphis as to constitute proof of any assumption of the liability of an insurer. As to verbal agreements and representations concerning this obligation and its extent, the finding of the jury seems conclusive against the claim now asserted by complainant.

In response to the third issue of fact the jury responded that "they assumed a liability verbally and according to terms of the written contracts to *carry* insurance for the benefit of railroads, transportation lines, or owners upon all cotton in bales while in their possession."

In response to the fourteenth issue, which called for a finding as to representations made as to its

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liability for cotton destroyed by fire, the jury responded that it "represented to the agent of complainant that the cotton in their (the compress company's) presses was fully insured, as per contract already exhibited in answer to the first issue."

These findings are abundantly sustained by the evidence, and we decide that the compress company did not agree or promise, verbally or otherwise, to assume the responsibility of an insurer against loss or damage by fire.

Fourth.—This brings us to a consideration of the alleged obligation of the compress company to carry insurance in terms and amount sufficient to cover the interest of owners until actual delivery to the carrier.

The learned Chancellor, in an able and elaborate opinion, reached the conclusion "that both the Newport News and Mississippi Valley Company and the compress company assumed an obligation to fully insure the cotton in the press from the moment it was received there until it was delivered on the cars for transportation."

The position of counsel representing the compress company, presented in pleadings and in argument, is that its contract for insurance of owner's interests is found alone in its dray ticket receipts, and that upon the surrender of this contract to the carrier, and the acceptance of bill of lading, the compress company ceased to bear any relation, by contract or otherwise, to the depositor of cotton, and that the carrier was substituted in the

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relation of bailor formerly held by the depositor, and that the latter must thenceforward look alone to his bill of lading and to his own insurance for protection; that, on the other hand, the relation and liability of the compress company to the carrier who had taken up the dray tickets, and in exchange given its own bill of lading, is not identical with that formerly held by the depositor, but is to be determined alone by the written contract for compression existing between the carrier issuing bill of lading and the compress company. This argument concedes that the interest of owners was within the insurance obligation assumed by the defendant until terminated by surrender of the contract contained in dray ticket to the carrier. This position assumes that the dray receipts, in themselves, constitute the contract between the depositor and the cotton-press company. If conceded, it would narrow the controversy to a construction of the language of these receipts, and a determination of the effect of the transfer of them to the carrier in exchange for a bill of lading, and the subsequent surrender of same to the compress company for a different receipt. This presents altogether too narrow and contracted a view of this case. In order to determine the character and extent of this obligation concerning insurance, we must look to the course of business between the compress company and the depositors of cotton, its relations to the cotton-buyers and cotton-shippers at Memphis, its relations, contractual or otherwise, to the

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carriers who issued bills of lading upon its dray receipts, and the representations concerning insurance made by its agents and officers to those doing business with it, and especially to Bowles & Sons, the agents of complainant and the depositors of this cotton.

The evidence establishes that at the date of this transaction, and for several years previous, the railway companies had no rate for compressed cotton. The rate was exclusively for uncompressed cotton in bales. The carriers were accustomed in their bills of lading to stipulate for the privilege of compression at their own expense. For many years the defendant compress company had had an absolute monopoly at Memphis of the compression business. During this time it had contracts with every railway entering Memphis, identical in substance with the one set out in statement of the case. Under their contracts each carrier contracted to give to this defendant all cotton shipped over its line for compression. The agreement by which the carrier contracted with the compress company to issue bills of lading upon its dray tickets was undoubtedly the result of an arrangement between the carriers and shippers and compress company, and was intended to facilitate the prompt issuance of bills of lading and avoid delay while awaiting compression. The consignor of cotton was thus enabled, so soon as he could have his cotton drayed to the compress, to obtain a bill of lading, upon which he could draw for

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value of shipment against his consignee. This arrangement saved capital, and interest on capital, and greatly advanced the interests of buyers of cotton on Memphis market.

The fourth clause in the compression contract with the Newport News and Mississippi Valley Company, constituting the compress company the agent for the carrier for the receipt of cotton, is the important feature of this contract. It was an essential part of the arrangement by which the carrier accepted a delivery at the cotton-press as a delivery to it, and by which the consignor assented to the stipulation permitting the carrier to have all cotton intrusted to it for transportation compressed before shipment. This agency for any particular carrier could not, with reference to any particular lot of cotton, begin until the cotton had been received for compression, and for shipment over line of a designated carrier with whom a compression contract existed. Hence arose the permit system, under which no cotton was received into the compress (as a general rule) until a permit had been granted by the carrier controlling the particular press in which the shipper wished his cotton deposited. It is true that permits were not in every instance demanded, and it is likewise true that the depositor obtaining such permit was not thereby obligated to ship his cotton out over the line granting the permit. It was regarded, however, as indicating that the depositor expected to "route" his cotton out over the line granting per-

mit. The obligation of the carrier to issue his bill of lading upon cotton so "permitted" into a particular press did not by the contract arise until the depositor's dray tickets were presented. These evidenced the fact that the compress company held the cotton for compression, and the carrier accepted the delivery to him of the dray receipts as a symbolical delivery of the cotton, though the cotton was actually in custody of the compress company, and was to remain there until compressed.

The liability of the carrier to the shipper unquestionably began when it issued its bill of lading. To protect itself it contracted that the compress company should stand responsible to it as a bailee for hire, and that it should carry insurance covering the cotton against loss by fire while in its custody. It might have limited the obligation of the bailee to an insurance of its *interest* in the cotton from date of issuance of bill of lading, or to insurance against liability upon its bill of lading. In such case, if the insurance had issued in *these terms*, the owner's interest in the insurance would have depended upon the primary liability of the carrier to the owner by reason of some breach of carrier obligation. But the carrier did not limit the obligation of the compress company to a procurement of insurance protecting only its insurable interest. In the same terms by which the compress company contracted to compress all cotton, it contracted to carry insurance upon all cotton in

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its presses for compression. Its contract was that it should "compress all of said cotton, and shall insure the same for the benefit of the first party." The cotton itself was to be insured. For the benefit of the carrier it is true. But a carrier has such an insurable interest in goods intrusted to him for carriage that it may insure not only its interest or its liability, but the whole value of the goods. And in such case it may collect the whole value, and, after re-imbursing itself for its special loss, it will hold the surplus in trust for the owners. Wood on Fire Insurance, Sec. 294. *Home Insurance Company v. Warehouse Company*, 93 U. S., 541.

An insurance for the benefit of a carrier upon the goods in its custody, not limited to an insurance of its liability or interest, is an insurance of the whole value, and one in which the owner has an interest. The case of *Home Insurance Company v. Baltimore Warehouse Company* is an instructive and well-reasoned case, and meets our approval. The insurance in that case was taken out by warehousemen against loss by fire "on merchandise their own, or held by them in trust, or in which they have an interest or liability," contained in a designated warehouse. It was held that the policy covered the merchandise on storage itself, and not merely the interest or claim of the bailee. The assured was allowed to recover the entire value, holding the remainder, after satisfying their own loss, as trustees for the owners. The warehouse-

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men were under no obligation to insure owner's interest, their warehouse receipts containing, by requirement of charter, a statement that it "was not insured by the corporation."

Evidence was offered tending to show that the insurer and assured intended only to insure the interest or liability of the warehousemen. This proof was rejected upon the ground that there was no ambiguity; that the merchandise itself was insured, and not the interest of the assured; and these plain words could not be explained away by parol. 93 U. S., 527.

The case of *London and North-western Railway Company v. Glynn*, 1 Ell. & Ell., Q. B., 652, is a leading case much cited. The policy was for £15,000, "on goods their own and in trust as carriers" in a certain warehouse. In an action on the policy it was held that, to the extent of the policy, the whole value of goods in the warehouse in the carrier's possession was insured by it, and not merely their interest in the goods, and that the carriers would be regarded as trustees for the owners of the amount thus recovered, after deducting their charges as carriers.

So in the case of *California Insurance Company v. Union Compress Company* the policy was taken out by the compress company to cover cotton "their own, or held by them in trust or on commission." It was conceded that this policy covered owner's interest; but the contention was that railway companies which had issued bills of lad-

ing upon the cotton while in the compress, and which had been held liable, as carriers, for the value of the cotton (the fire being result of negligence of carriers), were not beneficiaries under the policy. It was held by the Court that the railway companies, with outstanding bills of lading, had an insurable interest in the cotton, and to that extent were the owners of the cotton which was held in trust for them by the compress company. 133 U. S., 409.

In the light of these authorities, we are of opinion that the contract between the Newport News and Mississippi Valley Railroad Company and the Merchants' Cotton-press and Storage Company imposed an obligation upon the latter to insure all cotton in their presses against loss by fire, and that this obligation was imposed in such broad and unambiguous terms as to require insurance upon the full value of the cotton, and covering every interest in such cotton.

The compress company was under no duty to insure owner's interest, unless this contract imposed the duty and furnished the consideration. That it regarded this obligation as imposed would seem to be indicated by the terms of its policies of insurance on cotton in press No. 4. This insurance amounted, at date of this loss, to \$301,000, and was in about forty different offices. All of this insurance was (in so far as the written parts of the policy show) in the same terms and upon same interest, and was in these words:

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"On all cotton in bales received by them as agents, for the benefit of railroads, transportation lines, or owners, in the boundaries of the Merchants' Cotton-press and Storage Company's west navy-yard compress, situate and bounded as follows: East by the west line of Fulton Street, west by the Mississippi River, north by Auction Street, and south by Market Street.

"The liability of the insurers is to begin on the receipt of said cotton on premises of the assured, as herein described, for compressing, and is to cease and terminate when removed from the platforms of the Merchants' Cotton-press and Storage Company for transportation."

In express terms these policies covered "all cotton in bales received by them as *agents*," and for the benefit of railroad or owner. We attach no importance to the disjunctive "or." The clear contract was to insure the *cotton itself* in the hands of the assured *as agents*; whether agents for railroads, transportation lines, or owners, it was alike insured, and for the benefit of these different classes of persons having insurable interest. There is no ambiguity in the policies, and evidence offered to show an understanding limiting the plain and obvious meaning of the written contract of insurance was not admissible, and was properly rejected. 93 U. S., 527; 133 U. S., 418; 36 Md., 398; 66 Md., 339.

That this obligation was imposed upon the compress company primarily to secure the railway

company itself, cannot affect the fact that in securing its own protection it likewise secured the interests of owners. Many reasons might be suggested moving it to demand that the cotton itself and not merely its own liability or interest should be covered.

The obligation thus imposed upon the compress company to insure the cotton itself against any loss, during the entire period of its custody, explains the representations made by the officers and agents of that company concerning its liability to carry insurance. It accounts for and explains its representations—made orally and in writing and printed upon its dray tickets—that cotton was insured for benefit of owners; and the finding of the jury that it represented that cotton was so insured while in its press is abundantly supported. This obligation was co-extensive with its custody. It was not limited by the life of the dray ticket. It was not affected by the issuance of the bill of lading. The actual possession of the cotton remained with the compress company. The effect upon the possession of the compress company of the issuance of a bill of lading while the cotton was in fact in the custody of the compress company, was discussed in *Insurance Company v. Compress Company*, *supra*. What was there said is so applicable that we quote a paragraph: "As to the suggestion that by the bills of lading the possession of the cotton was transferred to the railroad companies, and that the policy was avoided thereby,

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the answer is, that the cotton was still in the hands of the plaintiff, in its actual possession, and upon its premises. At most the railroad companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took only constructive possession of it; and the plaintiff, retaining actual physical possession of it, did not lose the right to effect insurance for its own benefit, and as bailee or agent, for the protection of the railroad companies. All that the railroad companies acquired was the right to ultimate possession, which passed to them by the transfer to them by the original depositors of the cotton receipts given by the plaintiff." 133 U. S., 415.

Fifth.—What is the liability of the Newport News and Mississippi Valley Company by reason of the failure of the cotton-press company to carry insurance sufficient in amount to cover full value of owner's interest? Was this railway company under any obligation as to insurance? The Chancellor on the facts, and upon a construction of its contract with the compress company, reached the conclusion that "the railroad company, by its contract with the compress company, in express terms assumed this obligation, and appointed the latter its agent to carry it out."

Unless the imposition of an obligation upon the compress company is the same thing in law as an express assumption of a like obligation, then this conclusion is not to be sustained. Nowhere in that contract does the railway company assume that

it is under any obligation concerning insurance. Neither are we able to give any such construction to this contract as constitutes the compress company the mere agent of the railway company in carrying insurance. If the carrier was, by law or by contract with shippers, obligated to carry insurance, then it would not escape responsibility by showing that it had required the compress to do what it was bound to do. It could not thus throw its duty upon another. The liability of the Newport News and Mississippi Valley Company was the liability of a carrier, not the technical liability of an insurer. After bill of lading issued it was not liable for a loss by fire, unless the result of negligence. This liability of a carrier, modified or not by fire clause, was one which it could carry or insure against. It was under no obligation whatever—this contract out of the way—to carry insurance either upon its own liability or covering owner's interest. In view, however, of its own liability, it was a wise and reasonable precaution to require the compress company to carry insurance for its benefit. That this contract bound the compress company to insure the cotton *itself*, and not merely the carrier's responsibility, and thus such insurance would incidentally inure to the benefit of owners, affords no reason whatever for holding the carrier liable for the failure of the cotton-press company to fully carry out its obligation. The *voluntary* imposition of an obligation of insurance incidentally beneficial to own-

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ers of cotton is not in law or reason the same thing as the assumption of an obligation of insurance. The failure of the cotton-press company to carry such insurance may result in incidental damage to owners; but unless the railway company was under some obligation to insure, or that the compress company should insure, no right of action exists in favor of owners against it. There is no privity between the railway company and owners with respect to insurance. If it could be shown that the railway company had represented to shippers that cotton, while awaiting compression, was covered by the policies of the corporation employed by it to compress same, and such shipper, in reliance upon this representation, had accepted a bill of lading giving the carrier a right to have the cotton compressed, and had not, by reason of these representations, taken out insurance for himself, then an action would lie upon such facts. But no such case is made here. The most that can be said is that the general purport of the contract was known to shippers, though these contracts were private, unregistered instruments, and manifestly not intended by the carriers to influence or affect the action of shippers as to insurance. But assuming that this complainant knew the precise terms of this contract, in what way is he to draw from it the conclusion that, in case the compress company fails to insure, he may fall back upon the railway because the railway has imposed voluntarily the duty of insurance upon the

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compress company? The agency of the compress company for the railway company in no way related to insurance. The body of this contract related to the terms and conditions upon which compression of cotton should be carried on for the railway company. With respect to this we must regard the compress company as an independent corporation, carrying on the business of compression for all who demanded its services. The railway company, as a large customer, required, as a condition upon which it would do business, that it should carry insurance. This was an obligation imposed upon the compress company, and not one assumed by the railway company to be executed by the former as agent for the latter. No other relation existed between the railway company and the compress company than shown by the written contract. This the jury have expressly found in response to the ninth issue. We find no reason for doubting this fact.

The compress company was regarded by all who had dealings with it as the only obligated party as to insurance. The bill nowhere charges an obligation, imposed by law or assumed directly or indirectly by the carrier, to insure or cause to be insured the interest of shippers. As stated in a foregoing part of this opinion, the relief which seems to have been contemplated by the pleader was a mere substitution of complainant to the rights and equities of the railway company under its contract with the compress company. That

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these contracts between the several carriers and the cotton-press company tended very directly to suppress competition and to build up and sustain a monopoly we have no doubt; but that the monopolistic tendencies of these arrangements should have the effect of imposing an obligation of insurance not otherwise deducible from the contracts, is not so clear or understandable.

Whatever loss complainant has sustained by failing to protect itself by its own insurance, was wholly due to reliance upon the representations concerning insurance made by the compress company. The railway company entered into no direct obligations with owners concerning insurance, and made no representations, misleading or otherwise, on the subject. The obligations and representations of the compress company were not the obligations or representations of any authorized agent of the railway company, and there is nothing in this record which entitles complainant to any decree whatever against the railway company.

Sixth.—We come now to a consideration of the damage resulting to complainant by the breach of the obligation of the cotton-press company to carry insurance sufficient to cover full value of the cotton destroyed by fire. To the extent that it took out policies of insurance in good and solvent companies, in terms covering owners of cotton against loss or damage by fire until actual delivery to the carrier, it has complied with its obligation. As to such insurance it is a trustee for the owners, and

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as trustee it is bound to make proofs of loss, and institute necessary proceedings for collection.

Assuming that the insurance in force shall be collected and distributed *pro rata*, it will leave about four-sevenths of the value uninsured by policies carried by the warehousemen. Is the defendant liable for this uninsured loss? This will depend upon the legal effect of a contract to carry insurance. A contract to carry insurance, or to cover with insurance, or a representation to a depositor that his deposit is insured, is very different in its legal effect from the absolute liability of an insurer. In the latter case the action would be upon the risk or policy for the value of the property destroyed, if within the amount of the risk. In the other cases the action would be for such damage as resulted from breach of the obligation to carry insurance. The measure of damages may in both cases be the same—the value of the property destroyed. The difficulty in this case arises from the fact that complainant at the time of this loss was covered by a marine risk in the Insurance Company of North America, containing a fire clause covering “goods on shore prior to shipment” for ten days. That this risk covered this cotton at time of loss is not disputable. Prior to the bringing of this suit an amount of money equal to the full value of the cotton burned, plus ten per cent. (that being the terms of the policy), was paid over to complainant, and a paper executed styled in the record a “borrowed and re-

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ceived note." This document is in following words:

"BOSTON, MASS., January 23, 1888.

"Borrowed and received of the president and directors of the Insurance Company of North America, of Philadelphia, Pa., the sum of twenty-two thousand thirty-seven dollars and sixty-nine cents (\$22,037.69), being a loan pending the investigation and determination whether the loss of four hundred and thirteen (413) bales of cotton, being part of a lot of 500 hundred bales marked <L> K, 1—500, shipped by Wm. Bowles & Sons, Memphis, under a bill of lading of the Indiana, Bloomington and Western Railway Company, dated Memphis, November 16, 1887—said cotton reported burned at Memphis on or about November 17, 1887—is a loss for which the carrier should be held liable; and if the carrier should be held liable, the undersigned agrees to return to the said president and directors the amount thus loaned when and to the same extent same shall be recovered from the carrier.

"(Signed)

LANCASTER MILLS,

"By HARCOURT ARMORY, *Treas.*"

The Chancellor, in speaking of this defense to this suit, thus states the issue presented by this receipt:

"The only question for judgment between the parties to this suit is whether the transaction between the complainant and the Insurance Company of North America is a payment of this loss. If

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it is, the defendant's breach of duty and of contract has not damnified it, and there can be no recovery here."

Upon a construction of this receipt, and upon the authority of the case of *Inman, Swan & Co. v. Railway Company*, 129 U. S., 129, the Chancellor reached the conclusion that this was not intended as a payment, but as a mere loan pending determination of the liability of the other parties supposed to be primarily liable for the loss. It would seem that if the Lancaster Mills, not relying upon the obligation of the compress company to carry insurance, had, for itself, procured other insurance in good and solvent companies, it would not be heard to say that it had been damnified by the failure of the defendant to do for it what it had done for itself. It is not, however, necessary to determine this, for we are convinced that the transaction between the Insurance Company of North America and the complainant, and evidenced by this receipt, is in fact and law a payment and satisfaction of the loss sustained by the burning of this cotton. The substance of this transaction is that the insurer has paid the amount of its liability under the policy, subject alone to be repaid upon the contingency that the assured shall recover same from the carrier as being primarily liable. The precaution taken in calling it a loan was doubtless due to a fear that payment might affect the right of the insurer to the benefit of a recovery against the carrier.

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This precaution cannot change the fact that the assured has been paid, and that this payment is to stand unless a liability shall be fixed upon the carrier, in which case the recovery from the carrier is to inure to the benefit of the insurer. The precaution was unnecessary. If the liability of the insurer was secondary, and it pays the loss, it is substituted to the rights of the assured against the party primarily liable, and may maintain a suit in the name of the assured for its benefit.

If the carrier or compress company is, as between it and the insurer of the owners, primarily liable, then an action in the name of the assured may be maintained for the benefit of the insurer, and the fact of payment will not affect the recovery. This we expressly decided at this term in the case of *Railroad v. Manchester Mills*, 88 Tenn., 653.

The case of *Inman, Swan & Co. v. Railroad*, *supra*, is not in any way in conflict with the conclusion we reach as to effect and meaning of this borrowed and received note. In that case it appeared that cotton in the custody of a railway company was destroyed by fire. The carrier's bill of lading stipulated that it should have the benefit of any insurance held by owner on goods destroyed by fire while in its possession. On the other hand, the owners held open policies of insurance on the burned cotton, which provided the assured should, in case of loss, transfer to the insurer his claim against the carrier, and

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providing that the insurance should be forfeited in case any agreement was made by the assured whereby the insurer's right to recover of the carrier was released or lost. The owners filed proofs of loss, and their open policy was re-instated for original amount. They then entered into an agreement to prosecute their claim against the carrier as the party primarily liable, and the insurer agreed to allow interest on the claim until collected.

The Court held that this stipulation did not amount to a payment; that the policies were not available to the carrier, inasmuch as the liability of the insurers depended upon the condition of resort over against the carrier. It was also held that the insurers under their contract had the right to require the assured to proceed first against the carrier, and to decline to indemnify them until the question of the carrier's responsibility was first settled. That case and this are totally unlike both with respect to the fact of payment (for no money was paid or loaned to the assured) as well as in the more important distinction that there the carrier's liability was primary as between it and the insurer. So we hold: First, that in point of fact the complainant has received payment for its loss from its own insurer; second, that this fact of payment would not prevent the maintenance of a suit for the benefit of the insurer of the owner in the name of the assured, provided the loss is one which the defendants ought to have

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paid as between them and the insurer of the owners. If the liability of defendants, or either of them, was a direct one—as for negligence, or by contract for the absolute “safe-keeping” of the cotton—then the liability of defendants would be primary as for a loss proven or presumed to have been caused by them. In such case the insurer of the complainant would be subrogated to the right of the assured against the party primarily liable. This distinction is very clearly and forcibly illustrated in the case of the *North British Insurance Company v. London, Liverpool and Globe Insurance Company*, 5 Chancery Division, Law Reports, 569.

As this case has been much relied upon by the learned counsel for complainant, we briefly state the facts of the case. The case was this: A firm of warehousemen “being by *express agreement*, or a local custom of London,” liable for any loss or damage which occurred to grain warehoused with them, for their own protection took out policies on grain in their custody. The owners of certain grain so warehoused, although they had the primary liability of the wharfingers, for their better protection took out policies in another company upon their interest in the same grain. A loss occurred. The wharfingers’ companies and the bailors’ companies contributed to a fund to re-imburse the warehousemen, who had paid the loss to the owners of the grain. The suit was one between the respective companies to determine how the loss should be borne between themselves. It was held

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that the wharfingers' companies were liable for the whole loss, notwithstanding there was the usual clause requiring contribution where there was double insurance. The decision was rested upon the ground of the primary and absolute liability of the warehouseman to the owner of the goods in his custody. If the wharfinger had taken out no insurance, and the insurer of the owner of the grain had paid the loss, it would have been substituted to the assured's right of action against the wharfinger, who was absolutely and primarily liable. The warehouseman had by his insurance protected himself against this primary responsibility. It was held, therefore, not to be a case of double insurance, but of separate insurance upon entirely different interests.

Here the essential fact which would entitle the insurer of the owner of the warehoused cotton to recover is missing—that is, the primary and absolute liability of either the carrier or compress company. The liability to the owner for a breach of obligation to carry insurance is not a primary liability as between the compress company and the insurer of the owner. By subrogation the insurer obtains no right which the assured could not enforce. As the assured did for itself just what the compress company agreed to do for it, and having no right of action save for premiums, its insurer, who has paid the loss, has none. Whatever rights the insurers of the complainant have against the insurers of the defendant compress company for contri-

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bution must be settled in a suit between themselves. These insurers are not parties, and we therefore express no opinion upon this question.

The decree of the Chancellor holding that complainant had not been indemnified by its own insurer, was erroneous, and this results in dismissal of complainant's bill, with costs.

VACCARO v. CICALLA AND CICALLA v. VACCARO.

(Jackson. May —, 1890.)

1. CHANCERY COURT. *Jurisdiction over trusts. Decrees valid, when.*

Decrees of Chancery Court are valid, when regularly entered, without objection to Court's jurisdiction, in a suit brought by a trustee against his *cestui que trust* for the avowed purpose of obtaining approval by the Court of his current administration of a clear and unambiguous trust as a precaution against future litigation, no other cause for invoking the assistance of the Court being apparent or suggested.

Cases cited: Kerr v. White, 9 Bax., 168; Caruthers v. Caruthers, 2 Lea, 71; Bowling v. Scales, 2 Tenn. Ch., 63.

2. SAME. *Same. Infants bound by the decrees.*

And infant *cestui que trust*, who are regularly before the Court, are concluded by such decrees equally with adults, except that they have longer time, by reason of their disability, to institute suit for relief.

Cases cited and approved: Rogers v. Clark, 5 Sneed, 665; Winchester v. Winchester, 1 Head, 460.

3. SAME. *Same. Trustee's settlements; their effect. How impeached.*

And settlements of the trustee, made and confirmed in due course of such legal proceedings, have the effect of decrees, and import, not mere *prima facie* correctness, but absolute verity; and such settlements cannot be impeached, even by infant parties, except in the manner and for the causes admissible for impeachment of regular decrees.

Cases cited and distinguished: McGavock v. Bell, 3 Cold., 517; Livingston v. Noe, 1 Lea, 55; McCown v. Moores, 12 Lea, 635.

4. SAME. *Same. Settlements not reached by bill to surcharge and falsify.*

And trustee's settlements, thus made and confirmed, are not open to attack by mere bill to surcharge and falsify them, which does not attack them as decrees.

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5. SAME. *Same. Trustee's settlements with County Court, their effect.*

Settlements made by trustee with the County Court, in his character as executor, are treated as only *prima facie* correct, and can be successfully attacked by bill to surcharge and falsify them.

Code cited: § 4535 (M. & V.); § 3786 (T. & S.).

Case cited and approved: Matlock v. Rice, 6 Heis., 33.

6. SAME. *Has no power to alter decree at subsequent term.*

Chancery Court has no power to alter even an interlocutory decree at a term subsequent to its rendition.

7. APPEAL. *Brings up interlocutory decrees for review.*

An appeal in a chancery cause brings up the whole record, including interlocutory decrees, for review, even where it is granted by an exercise of the Chancellor's discretion under § 3874 (M. & V.) Code from a decree not final, but merely determining the principles involved and ordering an account.

Code cited: § 3874 (M. & V.); § 3157 (T. & S.).

Case cited and approved: Bomar v. Hagler, 7 Lea, 85.

8. TRUSTEE. *Allowance of attorney fees. Improper, when.*

Trustee is not entitled to credit for compensation paid to an attorney out of the trust fund, either for services that he should have performed himself, or for services rendered in a suit brought by the trustee improvidently and for his own protection.

9. SAME. *Same. Proper, when.*

But the trustee is entitled to have reasonable fees of counsel, incurred for necessary advice and litigation, paid out of the trust estate.

10. SAME. *Not chargeable with interest, when.*

A faithful and honest trustee will not be charged with more interest than he received, where, though guilty of a technical breach of trust, it appears that he acted in good faith, was diligent in making investments of the trust funds and inflicted no loss by his unauthorized act.

11. SAME. *Reasonable time for making investments of the trust fund.*

Requirement that trustee shall in future invest all trust funds within three months after receiving them held reasonable upon the facts of this case.

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12. GUARDIAN AND WARD. *Guardian of ward's person not appointed, when.*

The Court declined to appoint a guardian for three female infants, between 14 and 21 years of age, whose entire estate was in the hands of an honest and capable testamentary trustee, who, though never having qualified as guardian, had faithfully performed for them all the duties of that office.

Cases cited: Bowling v. Scales, 2 Tenn. Ch., 63; Kerr v. White, 9 Bax., 161.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
B. M. ESTES, Ch.

H. C. KING and LEE THORNTON for Vaccaro.

U. W. MILLER and MALONE & MALONE for Cicalla.

W. M. SMITH, Sp. J. Paul Cicalla died in Memphis October 6, 1878, leaving a will, which was admitted to probate December 2, 1878. B. Vaccaro, the complainant in the first cause named, which, for convenience, will be styled the "original cause," was named as executor, and was qualified on the day of the probate. After making several specific legacies, the will is as follows: "I give, bequeath, and devise to my three children—Delida, Parmelia, and Aurelia—all my property, of every description whatever, to be equally divided

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between said three children, share and share alike. I hereby name Bartholomew Vaccaro as my executor, having full confidence in his ability and integrity, and request him to accept the trust. I hereby, in this my will and testament, give him full authority to use, control, or dispose of my real estate for the benefit of my three above named children as in his judgment may seem best for the interest of the estate and of my children." Omitting a clause not necessary to quote, the will continues thus: "Should either of my children marry before reaching the age of twenty-one, I hereby direct my executor to pay over to such child or children entering matrimony her or their share of the property which is herein and hereby bequeathed."

At the death of the testator Aurelia was about ten years old, Parmelia about five, and Delida about three. Aurelia was then in Italy with friends, and has never returned to America. The other two were and have continued in Memphis. The personalty of the estate was not great, but the realty was quite valuable. The bond as executor was given to cover the personalty only.

The original bill was filed April 2, 1879. It recites that complainant, the executor, had filed his inventory and report of sales, and had made his first settlement as executor in the Probate Court. The record of the Probate Court on file shows that this first settlement was made March 28, 1879, and confirmed July 11, 1879.

The settlement is not embraced in the probate

record, but is set out in complainant's second settlement in the Chancery Court. There seems to have been no other settlement of the accounts of the executor in the Probate Court, nor any other proceedings there, except a citation issued September 5 and served September 8, 1881, to the executor to appear and settle his accounts. The Clerk certifies that, after this, nothing appears except a memorandum showing a notice by mail to Vaccaro to appear and settle, and a note from his attorney to the Clerk, dated May 11, 1882, stating that the administration of the estate of Cicalla "is now being wound up in the Chancery Court in case of *Vaccaro, Ex'r, v. Cicalla.*" The bill alleges that complainant is advised that, by the terms of the will, he "is authorized and empowered to take the control, possession, and management of testator's real estate, with unlimited power of control and disposition, for the use and benefit of his children, and also that the control, maintenance, and education of the children are devolved on him as trustee under the will."

He then alleges that he reluctantly consented to accept the trust, and did so merely to oblige an old friend and brother Italian. The bill continues as follows: "And to prevent mistakes in the execution of the trusts, and to close all transactions as he goes along in the execution of his duties under the will as executor and trustee, and to have the judgment of the Court as *res adjudicata*, without waiting for the infant devisees and lega-

tees to become of age, when perhaps complainant himself may be dead, he files this bill," etc.

The prayer is "that the will be construed, and the complainant instructed as to the proper execution of the trusts devolved on him; that the interest of the several residuary devisees and legatees under the will, and in future accretions of the estate, be defined; that complainant be instructed and directed as to the amounts to be expended on the infant children in their support and education from month to month and year to year; that complainant be allowed to make frequent settlements of his trusts with the Master of this Court, and have the protection of regular decrees thereon, which shall at all times be binding on said infants as *res adjudicata*."

It will be observed that the complainant does not seem to have any doubts as to his duties and powers, or to suggest any difficulties in the will to be construed. The object of the bill seems to have been to have the whole administration in the Chancery Court, in order that complainant might have "the protection of regular decrees," which he was advised would always be binding on the infants. His object seems to have been to close every thing behind him, and this object is very candidly stated.

The infants were brought into Court as defendants, and a guardian *ad litem* appointed for them. He filed a formal answer, raising no question as to the propriety of the suit. No order was made

transferring the administration of the personalty from the Probate Court, but it seems to have been assumed that the filing of the bill, and taking jurisdiction by the Chancery Court necessarily transferred the administration. On May 20, 1879, an order of reference was made to the Master, directing him: Firstly, to make a settlement with complainant of his accounts as trustee under the will; secondly, to report what would be a fair and reasonable allowance for the support and education of the infant defendants from month to month; thirdly, what would be a reasonable compensation to complainant for the care, custody, and superintendence of the education and support of said infants per annum; fourthly, what would be a fair and reasonable allowance to the complainant as trustee in the preservation and management of the real estate, and collection and disbursement of the rents.

June 27, 1879, the first settlement as trustee in the management of the real estate was filed. This does not embrace any account of the personalty. Up to this period it appears that complainant had intended to make a distinction between his duties as executor and as trustee; for he says, in a deposition given in support of this first settlement, that he had made a partial settlement as executor in the Probate Court, and would make a final settlement therein as soon as practicable. But no such final settlement was made, and the whole administration was transferred to the Chancery

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Court. The Master reported this settlement correct, and fixed the compensation of complainant for the personal care of the resident infants at \$240 per annum, and ten per cent. of collections of rent for managing the real estate. The second settlement was not made until March 27, 1883. No reason is given for the delay; but no exception was taken on that account, or on any other, and it was confirmed. In this statement of accounts, which embraces the transactions of three years, the settlement made in the Probate Court in 1879 is set out. After this the settlements continued from year to year, being made and confirmed without exception, and usually on the deposition of complainant and the statement of his attorney. It is proper to state, however, that, with the exception of the matters hereafter alluded to, there seems to be nothing to object to in these settlements; and the management of the estate appears to have been prudently conducted, and to have resulted well. In each settlement \$240 per annum for the care of the persons of the infants is allowed, in addition to the compensation allowed by the Chancellor for the management of the real estate, viz., ten per cent. on rents, and five per cent. on sales; several sales of real estate having been made before the suit of the infants was begun. Two hundred and fifty dollars per annum for counsel fees was allowed, except that for the first year, from December 1, 1878, to December 1, 1879, \$350 was allowed. In addition to this, \$175 was allowed for counsel

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fees shown by proof to have been rendered in other suits for and against the estate. During the pendency of this suit several petitions were filed by the complainant, asking that sales of real estate be made or confirmed, and asking for instructions as to investments. And, upon these applications, sales were made or confirmed, and investments ordered.

On December 24, 1887, the three infants, by their next friend, Peter Sanguineti, a resident of Italy, who also claims to be the guardian in Italy of the children—they having property there—filed an original bill attacking the management of the estate by Vaccaro, and complaining specially of the allowance of \$240 per annum for the care of the persons of the infants, and of the annual allowance for attorney's fees, and also of the costs of the Court proceedings, claiming that they were unnecessary. The bill also prayed for the appointment of a guardian of the infants, and that after the appointment the accounts and settlements of Vaccaro should be examined and corrected, and that he should be required to give bond as executor or trustee sufficient to cover the large amount in his hands arising from rents and the sales of real estate. The bill also prayed that Sanguineti, the Italian guardian, should be permitted to remove the resident infants to Italy, the domicile of their sister. It also charged that Vaccaro was using the money of the estate in the business of the firm of which he is a member. The oath of

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Vaccaro is waived. He answered denying the material allegations of the bill, and insisting on the correctness of his charges and accounts.

After the filing of this bill the seventh settlement was filed and confirmed without exception. On December 21, 1888, a motion for the appointment of a guardian made on the bill of the infants was overruled, with leave to renew the application in the future. In the order overruling this motion Vaccaro was required to give bond as executor and trustee in the sum of \$40,000, with which order he at once complied; and the Chancellor, also in the same decree, ordered that the suit of the infants should be prosecuted with diligence, in order that a full investigation of the charges might be had. The eighth settlement was filed March 29, 1889. The Master reported thereon, and exceptions were filed by both sides. On September 27, 1889, an amended bill was filed on behalf of the infants, repeating the charges of their original bill, and seeking more distinctly to surcharge and falsify the settlements of Vaccaro.

The two causes were heard together on November 15, 1889, and, by order of the Chancellor, consolidated. The decree was that the Court had jurisdiction to entertain the original bill, but that the decrees made confirming the settlements are only *prima facie* correct; and subject to be attacked and shown incorrect by the bill of the infants. The decree will be further referred to only as to the points now controverted—viz., the allowance of

compensation for the care of the persons of the infants, the allowance of attorney's fees as a charge on the trust fund, the liability of Vaccaro for interest on the trust fund while not invested, and the application for the appointment of a guardian for the infants. The Chancellor disallowed all credits for attorney's fees. He also decreed that Vaccaro should be charged with interest on any amount of the trust fund remaining in his hands uninvested longer than three months, the charge to begin at the expiration of three months. The allowance for the care of the infants was set aside, and a reference ordered to ascertain what amount should be allowed; and it was determined that no order could be made removing the infants to Italy, but that a guardian should be appointed for them. A reference was made to the Master to report a suitable person for guardian, with directions to have the infants before him, "and if they have no objection to the trustee, and he will accept, that he will be appointed, the Court finding no reason to withhold from him the custody of the persons of the infants." The Chancellor further directed that in taking the account the Master should recast the accounts from the beginning to the end, including matters embraced in the probate settlement; but the settlements are only to be disturbed as to the matters mentioned, and the necessary effect they will have on the accounts. From this decree the Chancellor allowed complainant in the original bill an appeal. The appeal

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was perfected, and assignments of error in great detail have been made.

The only assignments deemed necessary to be noticed, and those relied on in the argument of the cause in this Court, are as follows: That the Chancellor erred in holding the settlements only *prima facie* evidence of the correctness of the accounts, because, being confirmed by decrees of Court, infants are bound by them as well as persons *sui juris*, and also because the Chancellor cannot at one term set aside interlocutory decrees made at former terms. Next, that, if the settlements can be re-opened, there was error in setting aside the allowance to the trustee for care of the persons of the infants, and for attorney's fees, and in charging Vaccaro with interest; and, lastly, that there was error in ordering the appointment of a guardian, the will giving Vaccaro control of the property, if not of the persons, of the infants until marriage or arrival at age. We now proceed to dispose of these assignments of error in the order named.

The Chancellor held that the Court had jurisdiction of the cause. It cannot be doubted that a Court of Chancery has jurisdiction of trusts, and of the management of trust estates. 3 Pom. Eq. Jur., 114, 115.

But the objection which seems to have been made on the hearing was that the Court had not jurisdiction, or at least should not entertain jurisdiction, on behalf of a trustee of a plain and un-

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ambiguous trust. Whether a testamentary trustee should be required to make settlements and administer the trust under the direction of a Court of Equity, on the application of the beneficiaries, was left an open question in *Kerr v. White*, 9 Bax., at page 168; but in *Bowling v. Scoles*, 2 Tenn. Ch., 63, such a bill was entertained, seemingly without doubt; and in *Caruthers v. Caruthers*, 2 Lea, 71, an administrator with the will annexed, the will giving "full power to sell and convey real or personal property" for paying debts and supporting the testator's children, filed a bill for the purpose of executing the trusts of the will. No question as to the jurisdiction of the Court to entertain the bill was made. We have no doubt that the Court had jurisdiction of the cause; and, having jurisdiction, its decrees must be treated as other decrees in equity, although the bill may have been improvidently filed. By such decrees, infants regularly before the Court, as these infant defendants were, are bound as though they were adults, with the qualification that, after coming of age, they may impeach them by bill of review for error apparent on the face of the decrees, or may prosecute a writ of error within the time after majority fixed for adults from the decrees. *Rogers v. Clark*, 5 Sneed, 665; *Winchester v. Winchester*, 1 Head, 460.

The decrees made in the original cause confirming the settlements were regularly made *inter partes*, and must stand on the same footing as other de-

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crees of the Chancery Court. They are not like the *ex parte* settlements of guardians and personal representatives made in the County Court, which, by statute, are only *prima facie* correct. The bill of the infants can be treated only as an original bill to surcharge and falsify—and thus re-open—these settlements. It does not charge that the decrees confirming the settlements are erroneous. The infants being bound by the decrees of confirmation, the accounts cannot be re-examined on their bill, fraud in obtaining the decrees not being charged or proved; and, though the decrees are interlocutory, the Chancellor could not, at a subsequent term, set them aside.

Counsel for the infants earnestly insist that the cases of *McGavock v. Bell*, 3 Cold., 517; *Livingston v. Noe*, 1 Lea, 55; and *McCown v. Moores*, 12 Lea, 635, are authorities to support the bill of the infants. We do not think so. In the first case the bill was treated as an original bill to impeach a decree for fraud. In the other cases the bills were bills of review. Here the bill is simply an original bill to surcharge and falsify the settlements confirmed by regular decrees of the Chancery Court. The settlement made by Vaccaro as executor in the Probate Court is only *prima facie* correct (Code, § 4535), and is therefore subject to the attack of the bill of the infants; but it cannot be disturbed except on clear and satisfactory evidence. *Matlock v. Rice*, 6 Heis., 33. There is no evidence in the record

to impeach it, and it must stand as a correct settlement.

But, although the decrees of the Chancery Court in the original cause cannot be re-opened on the bill of the infants, they are before this Court for review on the appeal granted to complainant in that cause. True, the appeal was not a matter of right; but an appeal granted by the Chancellor, under § 3874 of the Code, from a decree determining the principles involved, and ordering an account, brings up the whole record for review, just as an appeal from a final decree. *Bomar v. Hagler*, 7 Lea, 85. The other errors assigned must therefore be examined on the appeal from the decree in the original cause.

We think the allowance made to the trustee for the management of the property is sufficient to compensate him for the care of the persons of the infants. The reference ordered by the Chancellor to ascertain what amount should be allowed will not be renewed. We agree with the Chancellor that no credit should be given the trustee for attorney's fees for services in this litigation. The will of Cicalla is very clear, and needed no construction, and the powers of the executor and trustee are ample and clearly defined. He could have made sales and investments in his discretion, without the decrees of the Court, and the necessity for administering the trusts in chancery does not appear.

We think, therefore, that the bill was improv-

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idently filed, and that the suit was, as complainant in effect admits it, for his own benefit and protection. He is therefore not entitled to charge the fund of the infants for counsel fees in conducting the suit. The Court appointed counsel for them, who is paid out of the fund, and this is enough. We think, also, that much of the service shown to have been performed by counsel of the trustee was such as he could have performed himself. Having engaged counsel to act for him, he must individually bear the expense. 2 Perry on Trusts, Sec. 910; Schouler on Executors, Sec. 544.

But the decree goes too far in disallowing all credits for counsel fees in the settlement made in the Probate Court. A credit of \$250 is given for attorney's fees. We have already determined that this cannot be disturbed; and the proof shows \$175 paid to the attorney for services in other matters and suits. There is nothing to impeach the credit given for that amount, and it also will be allowed. The trust devolving on this testamentary trustee has been continuing for nearly twelve years, and is to continue till the marriage or arrival at age of testator's children. The property is valuable. It therefore seems reasonable that the trustee should have the benefit of counsel to advise him, and we think he should be allowed credit for \$500 for counsel fees in addition to the amounts above named. He will therefore be credited with these three amounts. The Chancellor will determine this question in the future.

We have already said that this trustee has managed the estate prudently, and that it has prospered in his hands. Though guilty, as the Chancellor said, of a technical breach of trust in depositing the trust funds to his credit in his business house, we do not think that any wrong was intended; and no loss has resulted. We find, also, that there has been no unreasonable delay in making investments. Under these circumstances, we are not inclined to punish a faithful trustee for a technical breach of duty by charging him with interest in past transactions. In future the rule as to interest established by the Chancellor in the decree will govern, unless he shall, from varying circumstances, see proper to change it.

The final question is as to the appointment of a guardian. The testator selected Mr. Vaccaro to hold the property for his children till their marriage or arrival at age. There can be no doubt as to this. Then the property cannot be taken from his custody unless a breach of trust, or tendency thereto, is shown. *Bowling v. Scales*, 2 Tenn. Ch., 63; *Kerr v. White*, 9 Bax., 161.

There appears no danger to this fund, especially since the Chancellor has required the trustee to execute bond with security, in the sum of \$40,000, for its protection. The custody of the property must therefore remain with the trustee. This trust, it is true, does not embrace the persons of the infants. Vaccaro is not a testamentary guardian, and has never claimed to be so by qualifying

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as the law requires. Code, § 3365. Then, is there a necessity for the appointment of a guardian for the custody of the persons of the infants only? The oldest, Aurelia, is very nearly of age, and domiciled in a foreign country. The other two are now grown, or nearly so; the youngest being fourteen, or thereabout. The guardianship would involve additional expense, which should not be incurred unless necessary. The Chancellor has decreed that Mr. Vaccaro is a proper person to have the custody of the children. If, therefore, he is willing to continue his supervision of them, and to provide for their education and maintenance, as heretofore, out of the trust fund, with such compensation as the Chancellor may determine proper, a guardian will not be appointed. If he declines to do so when the cause is remanded, the Chancellor will then appoint a guardian.

The result is that the decree will be modified as indicated in this opinion, and is in other respects affirmed. The two causes were properly consolidated, and will hereafter be treated as one. The costs of the Court below already accrued will be paid as the Chancellor directed, and hereafter to accrue as he may direct. One-half of the costs of this Court will be paid out of the trust fund, and one-half by B. Vaccaro individually. The cause will be remanded, in order that the decree as modified may be carried out and the trust estate finally settled.

While concurring fully in the principle an-

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nounced, that infants are bound by decrees in Chancery, I think an exception should be made as to settlements in guardianship and administration cases, and that the same rule should be applied as to settlements in like cases in the County Court. The latter the statute wisely makes only *prima facie* correct; and I think, as to infants, this rule should be applied in the Chancery Court. This seems to have been the view of the Chancellor, and I agree with him.

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JACKSON, ORR & CO. v. SHELTON.

(*Jackson*. April Term, 1890.)

1. HOMESTEAD. *In lands held jointly by husband and wife.*

Homestead exists in lands held jointly by husband and wife as tenants by entireties; and the wife, who has obtained divorce and decree for the homestead, may assert that right against the husband's creditors in such lands or their proceeds.

Code construed: §§ 2935, 2936, 2937, 2946 (M. & V.); § 2113a *et seq.* (T. & S.).

Cases cited and approved: *Arnold v. Jones*, 9 Lea, 548; *Hall v. Fulghum*, 86 Tenn., 451; *White v. Fulghum*, 87 Tenn., 281; *Dickinson v. Mayer*, 11 Heis., 520; *Ren v. Driskell*, 11 Lea, 649; *Ames v. Norman*, 4 Sneed, 682.

Cited and distinguished: *McRoberts v. Copeland*, 85 Tenn., 211; *Avans v. Everett*, 3 Lea, 76.

Cited and overruled: *Cullom v. Cooper* (oral opinion at Nashville, December Term, 1888).

2. SAME. *Statutes exempting liberally construed.*

Doctrine re-affirmed that statutes exempting homestead are liberally construed in favor of claimant of that right.

Cases cited and approved: *White v. Fulghum*, 87 Tenn., 284; *Dickinson v. Mayer*, 11 Heis., 520; *Ren v. Driskell*, 11 Lea, 649.

3. SAME. *Effect of joint mortgage of husband and wife.*

Doctrine re-affirmed that the joint mortgage of husband and wife, made to secure one debt of the husband, does not defeat the right to homestead as against his other debts; and that homestead should be

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assigned out of the surplus proceeds where the lands are sold under such mortgage.

Cases cited and approved: Hall v. Fulghum, 86 Tenn., 451; White v. Fulghum, 87 Tenn., 281.

FROM BENTON.

Appeal from Chancery Court of Benton County.
A. J. ABERNATHY, Ch.

LUCIEN HAWKINS for Complainants.

J. E. JONES for Mrs. Shelton.

CALDWELL, J. G. W. Shelton and his wife, Roena Shelton, were joint owners as tenants by entireties of a residence in Camden. It was worth less than \$1,000; and he owned no other real estate.

In 1883 they conveyed it, by deed of trust, to secure the payment of certain debts to one H. F. Stegall. In 1888, when but a small part of the secured indebtedness remained unpaid, other creditors of G. W. Shelton filed this bill to foreclose the deed of trust and reach the surplus proceeds of the trust property for their own debts. G. W. Shelton made no defense, but his wife answered the bill, claiming homestead in the house and lot, subject to the deed of trust, the proper and binding execution of which she admitted.

Before the filing of this bill, Mrs. Shelton

brought her suit, in the Circuit Court, against her husband for divorce; and an absolute divorce was granted to her, pending the present bill, in the Chancery Court.

The Circuit Court, in its judgment granting the dissolution of the bonds of matrimony, also adjudged that, as between her and him, she was entitled to homestead in said house and lot—such adjudication being subject to the single reservation that it should not operate to the prejudice of the rights of complainants in the present bill.

Hearing the cause on pleadings and proof, the Chancellor adjudged that complainants were entitled to the relief sought in their bill, and that Mrs. Shelton had no right of homestead in the property involved. From that part of the decree refusing her claim to homestead she has appealed to this Court.

The conveyance of the residence by husband and wife, to secure payment of particular debts, is not a waiver of the right of homestead therein as against other debts. *Hall v. Fulghum*, 2 Pickle, 451. If the secured debts be not paid, and the deed of trust or mortgage be foreclosed, the surplus proceeds of the property is subject to the homestead right, and will be held as an exempt fund, to the extent of \$1,000, for re-investment in other real estate. *White v. Fulghum*, 3 Pickle, 281.

So that, in the case before us, there is nothing to defeat the claim of Mrs. Shelton in the fact that she and her husband conveyed this property in trust to secure Stegall's debts and that fore-

closure has been decreed. As against complainants her right is the same as it would be without such conveyance and decree. If in that case she would be entitled to homestead in the property, she is now entitled to the same right in such of its proceeds as may remain after payment of the secured indebtedness.

The homestead is in the head of the family, and, in case of marriage, in the husband *primarily*; but when the wife obtains a divorce from her husband, on account of his fault or misconduct, "the title to the homestead shall be vested by decree of the Court granting the divorce, in the wife, and after her death it shall pass to the children." Code (M. & V.), § 2946.

This provision of the statute was met by the judgment of the Circuit Court when granting Mrs. Shelton a divorce, and the homestead was thereby effectually vested in her, if in law the property was subject to the right of homestead at all. The reservation in that judgment did not diminish her legal rights thereunder, for complainants in this cause had taken no steps, nor indeed could they have taken any, which could operate to the prejudice of any *existing* right of homestead.

It follows, therefore, that Mrs. Shelton is now entitled to the right of homestead in said house and lot, or its proceeds when sold, subject alone to the prior claim of Stegall, if said property was held by such a title as to be subject to the claim of homestead by G. W. Shelton before the ex-

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ecution of the deed of trust. In short, the question is whether or not the right of homestead exists or inheres in real estate owned by husband and wife jointly as tenants by entireties. The learned Chancellor was of opinion that it did not, and so adjudged.

By the statute, "A homestead, or real estate in the possession of or belonging to each head of a family, and the improvements, if any, thereon, to the value of, in all, one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family—and which shall inure to the benefit of his widow and children, and shall be exempt from sale in any way at the instance of any creditor or creditors." Code (M. & V.), § 2935.

"Each head of a family owning real estate shall have the right to elect where the homestead or said exemption shall be set apart, whether living on the same or not." Code, § 2936. These provisions "apply as well to equitable as legal estates," and also "to leasehold property." Code, §§ 2937, 2938. And homestead exists in favor of one owning only a life estate in the land. *Arnold v. Jones*, 9 Lea, 548.

The homestead exemption is a favorite in this country, and laws concerning it are construed liberally in favor of the claimant. Thompson on H. & E., Secs. 4, 7, and 731; 9 Am. & Eng. Ency. of Law, 519; *White v. Fulghum*, 3 Pickle, 284; 11 Heis., 520; 9 Lea, 548; 11 Lea, 649.

The language of our statute is most comprehensive. In the description of the property in which the right exists, its terms are broad and unrestricted: "A homestead, or *real estate* in the possession of or belonging to each head of a family, * * * shall be exempt," etc.; and "each head of a family owning *real estate* shall have the right to elect," etc. Interpreting these words according to their ordinary significance, as must be done in the absence of any qualification or limitation upon them, there can be but little trouble in ascertaining the legislative intent. Undeniably the designation, "real estate," in its ordinary sense includes the interest of a husband in a house and lot owned by himself and his wife jointly as tenants by entireties. If such an interest is not, in fact and in law, *real estate*, what can it be? Certainly it is not personalty. So naturally does it fall within the meaning of the words "real estate," as employed in the statute, that they must inevitably be held to embrace it, there being nothing in other parts of the act, or in its history, indicating, even remotely, that the law-makers used those words unadvisedly or intended to omit or exclude such an interest from the protection of the statute.

Moreover, the *object* of the statute, as well as its language, demands this construction. It was conceived that an exemption law protecting \$1,000 worth of *real estate* to heads of families owning the same, would be wise legislation and promotive

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of the public welfare. To be so, it must be impartial, and apply alike to each head of a family owning "a homestead, or real estate," whether in fee, for life, leasehold interest, legal or equitable estate. The nature of the estate, or extent of the title of the beneficiary, was not of the essence of the scheme. The purpose was to stay the hand of the creditor as against a limited amount, in value, of real estate, of *whatever character*, belonging to any citizen who should be the head of a family. It was known, unquestionably, that different persons, entitled to the same protection, owned different interests and different estates in land, and terms broad enough to include them all were employed.

Why not include the head of a family who owns land as tenant by entirety with his wife in the scope of a law whose purpose is so humane and commendable? To the extent of his interest he can use the land for the shelter, support, and benefit of his family in the same manner as could another man owning the absolute fee. He stands in the same or greater need of the law's favor. Is he any the less deserving of protection because he does not own the whole estate? Or is the officer of the law to take what he has because he has not more? Manifestly not. The protection of such an interest is clearly within the spirit and the letter of the statute. We can conceive no satisfactory reason why the Legislature should not have intended to embrace in this wholesome pro-

vision *all present interests in land* naturally embraced in the language used in the Act.

Again, under the authority of *Ames v. Norman*, 4 Sneed, 682, the estate of G. W. Shelton in the house and lot in question here, might, before the deed of trust, have been seized and sold at law, and the purchaser at such a sale would have become vested with the "right to occupy and enjoy the rents and profits of the land during the joint lives" of Shelton and wife, and, in case Shelton survived her, with the fee.

Now, can it be that an interest in land which is so subject to seizure and sale, and the sale of which will vest in the purchaser the right to the full enjoyment of the whole property during the life of the debtor at least, is not real estate within the contemplation of the homestead law? We think not. If the creditor in right of the husband may take the whole property, at all events, during the life of the latter, so the husband, in his own right, may invoke the protection of the law for the whole property during the same period. The husband's estate under the deed, augmented by his marital interest in his wife's estate, becomes practically tantamount to the whole estate during their joint lives. It is so held in favor of his creditors seeking a sale, or in favor of purchasers at judicial sale; for like reason it must be so held in his favor when he asserts his claim for homestead.

That property held by husband and wife by entireties could not "inure to the benefit of his

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widow and children" upon his death, but would vest in her absolutely by right of survivorship, is not a sufficient reason for denying his right of homestead therein while they both live. If so, then the right of homestead could never exist in favor of a life tenant, for his estate ceases with his death, and nothing can "inure to the benefit of his widow and children" as homestead. But the right of homestead does exist in a life estate (9 Lea, 548), and in "leasehold property" (Code, § 2938), though the period of the lease may terminate in the life-time or at the death of the lessee.

The meaning of the statute is that, in *lands descending* from the husband and father, the homestead "shall inure to the benefit of the widow and children."

We cannot believe, in the absence of an express declaration to that effect, in the face of the law itself, that the framers of our Constitution, and the members of the General Assembly, intended to extend the benefits of the homestead exemption to citizens owning real estate in severalty, and not to those owning it jointly with their wives as tenants by the entirety.

A law making such a distinction would, in our judgment, be both impolitic and unjust. It would be an unjustifiable discrimination in favor of some persons and against others alike deserving of the law's favor and protection. Such is not our law, which, as we understand it, is distinctly *impartial*, extending the right of the exemption to "each

head of a family owning real estate," whether in fee, for life, for years, in severalty, in joint tenancy, etc.

The case of *McRoberts v. Copeland*, 1 Pickle, 211, is not in point. There a husband and father conveyed a tract of land to his daughters, reserving a life estate to himself and his wife. The Court held that after his death his wife took the life estate by survivorship in her own right, and that it should not be "reckoned as a part of his land in the assignment of homestead and dower" to her as his widow, because "all his title and interest in that particular tract of land ceased absolutely with his death." *Ib.*, 212, 213.

The husband's right of homestead exemption in the reserved life estate was in no sense involved, and could not have been under the facts of that case, it arising after all his interest had passed away. Had he made the claim of such right in his life-time, it should have prevailed; but how that would have been the Court was not called upon to express an opinion, and could not properly have done so.

As to the case of *Avans v. Everett*, 3 Lea, 76, wherein it was decided that the right of homestead did not exist in land held by tenants in common, we content ourselves with the observation that its reasoning (which we do not feel called upon to approve) has no application to this case, because here the debtor's interest is practically equivalent to an estate for life, at the least, in

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severalty, and is not an undivided interest merely, as in that case; that if sound upon its own facts, which we do not decide, the doctrine of that case should not be extended.

In *Mary C. Cullom v. John A. Cooper et als.*, decided at the December Term, 1888, the question was exactly the same as that involved in the present case, and the decision was against the claim of homestead. With the greatest care we have reconsidered the question, and now decide it otherwise, holding that the right of the homestead exemption does attach to real estate owned by husband and wife jointly as tenants by entireties.

For reasons already stated, it is clear that G. W. Shelton was entitled to homestead in the house and lot, subject alone to the deed of trust. The judgment of the Circuit Court granting Mrs. Shelton a divorce, vested her with the same right. She is now entitled to an exemption in the surplus proceeds of the property, the same to be re-invested according to law. 3 Pickle, 290.

Reverse the decree as to homestead, and enter decree in accordance with this opinion. Complainants will pay costs of appeal.

DISSENTING OPINION.

SNODGRASS, J. We do not concur in the holding that the homestead exemption applies to the interest of a husband in land held in joint tenancy

with the wife. He is not the owner of the property, or sole possessor as contemplated by our law.

Under the Constitution, "a homestead in the possession of each head of a family, and the improvements thereon, to the value, in all, of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same." Constitution of 1870, Art. XI., Sec. 11.

The statute of 1870 on this subject is in exactly the same terms, exempting "a homestead in the possession of each head of a family." It also provided that such homestead should inure to the benefit of the widow, and be exempt during the minority of the children occupying it, and until the youngest child reached the age of twenty-one years.

The sixth section of the Act provided that "the homestead in the possession of a husband shall, upon his death, go to his widow during her natural life, with the products thereof to her own use and benefit and that of her family who reside with her, and upon her death it shall go to the minor children of *her deceased husband*, free from the debts of the father, mother, or said children; and upon the death of said minor child or children, or their arrival of age, the same may be sold and the proceeds distributed amongst all the heirs at

law of the deceased head of a family according to the laws of descent and distribution in this State."

The seventh and eighth sections are as follows:

"Sec. 7. Upon the death of said head of a family without widow or minor children, said land shall be sold for the payment of the debts as may be legally established against *his* estate, and the remainder distributed among his heirs according to the rules of descent in force at the time in this State.

"Sec. 8. If the head of a family is married, and his wife obtain a divorce on account of his fault or misconduct, the title to the homestead shall be vested by the decree of the Court granting the divorce in the wife, and after her death it shall pass to *their* children."

These sections quoted show conclusively that the homestead contemplated was to exist on land owned by the head of a family; that it was such as might inure to the benefit of his widow (because she was such) after his death, and which would descend to *his* children, or, when sold, the proceeds might be distributed "among all the heirs at law of the deceased head of a family," "amongst his heirs."

It was an estate too which, after the death of wife or children, might be sold "to pay debts legally established against his estate," and was such a one that, if the wife obtained a divorce on account of his fault or misconduct, was to be vested by decree of Court in the wife for life, and after her death in "their children."

These provisions show, first, that the land subject to homestead must belong to the husband in severalty, and especially that they do not apply to lands held by husband and wife in joint tenancy. Such land goes to the survivor on the death of either. *Taul v. Campbell*, 7 Yer., 319; *Berrigan v. Fleming*, 2 Lea, 271; *Shields v. Netherland*, 5 Lea, 201; *McRoberts v. Copeland*, 1 Pickle, 211.

It is manifest, then, that a homestead on it would not inure to the benefit of his widow as such, and for her use and benefit and that of her family residing with her, and upon her death to the minor children of *her deceased husband*, because on his death the entire fee would vest in her, and "her family residing with her" could take no interest in it whatever, nor upon her death would it go to the minor children of *her deceased husband*. It would go to her devisee, or, in default of a will, to her children or heirs, and not to his, unless, of course, they were the same.

And, for the same reason, it could not be sold and proceeds distributed amongst his heirs in the contingencies provided for as quoted. Nor, upon divorce granted for his misconduct, could it be vested in the wife for life with remainder to *their children*, because that would be to limit her own fee for life, and deprive her of the power to devise her estate after discovery. If upon dissolution of the marital relation the property would vest in her, it would be absolutely. These considerations, it seems to us, show conclusively that

the homestead law is not applicable to such a tenancy; but there are others. If a legal homestead does exist on such an estate, what is the effect of it? Suppose a divorce granted to the husband. He would still remain the head of the family, and the homestead right would exist in him. Then, it must continue to the destruction of the wife's interest in the fee for life; so that in that event a homestead would be carved out exclusively for him in land which did not belong to him, but which in fact belonged also to another. So, too, the husband can abandon a legal homestead, and the fee in it may be sold in that event for his debts, and it will vest in the purchaser free from the homestead right; but it cannot be said that such sale would affect the wife's right in a joint tenancy, even if she joined in the abandonment because her interest in the fee, her right of survivorship, would not be affected by either abandonment or sale.

The Act of 1879, amending the homestead law of 1870, does not affect the question by adding to the words "a homestead," the words "or real estate belonging to each head of a family," because these words made no other change in the law than to give the husband, or head of the family, the right to elect where he would locate the homestead. *Flatt v. Stalder & Co.*, 16 Lea, 379. Now, suppose the husband elects to locate it on the joint tenancy of himself and wife, and dies leaving other lands. The wife, according to the case be-

ing considered, would take the selected homestead as such (although it was her own), and would thereby be cut out of any homestead in the husband's land. This would inevitably result if such an interest was a proper homestead, but we have held it was not, and defeated this very result in her favor. *McRoberts v. Copeland*, 1 Pickle, 211.

There are many considerations of like character which go to prove that such a joint estate in land was not within the contemplation of the law-makers in establishing "a homestead in possession of the head of a family;" and there is still a part of the statute unquoted which we think clearly shows that such an estate, nor any other estate held in common with others, was within such contemplation, and that only such as was exclusively within the ownership and possession of the head of a family was contemplated—such as he held in severalty, and could be set apart to him by metes and bounds, and that without resorting to a Court to partition and carve out for him such estate.

The third and fourth sections of the Act provide for levy upon the real estate of the debtor upon which the homestead is situated by execution and attachment, and directs that the levying officer shall summon three disinterested freeholders and have them set apart the homestead of the debtor out of the real estate levied upon. They are to fix the precise boundaries, and the remainder of the lands are to be sold. If it is of greater value than \$1,000, and is so situated that it cannot be

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divided so as to set apart the homestead, the freeholders shall certify the fact, and the officer shall sell the whole and pay proceeds to the Clerk of the Court rendering judgment or condemning the land for sale; and he shall, under order of the Court, invest \$1,000 in the purchase of a homestead for the family of the debtor, and the creditor take the surplus.

Now, it is clear that this cannot apply to an interest held jointly with the wife any more than with any one else, because, if it does so apply, it forces the sale of her land, and makes her take in lieu of all of it and all interest in it, her family share in the part allotted as homestead, or in that purchased for the benefit of the family. This, upon the theory that such is the effect that results under the law, and must result if this land is within its meaning. That these consequences could follow no one can maintain, and thus it appears that such an estate was never within the intent of the Act.

There are more reasons why such an estate could not be burdened with a homestead, by proper construction of our Act, than there are why a tenancy in common could not. The tenancy in common, while, like this, a legal estate, has no termination in survivorship, but will descend to heirs, and may inure to the benefit of a widow, not because of her own, but because of her husband's interest; and yet the reason of a want of an interest and possession in severalty, which pre-

vents a tenancy in common being so burdened, exists here, and equally precludes the possibility of the existence of a homestead upon a joint tenancy, and to this extent authority against homestead on a tenancy in common is authority against a homestead here. It was ten years ago decided that no such right existed in favor of a tenant in common. *Avans v. Everett*, 3 Lea, 76. And this has ever since been followed. But the direct question came before us at Knoxville, September Term, 1886, and it was then held such an interest as the wife's on survivorship could not be taken into consideration in fixing homestead, but the wife owned such land, and homestead must be assigned out of other lands of the husband. *Roberts v. Copeland*, 1 Pickle, 211, opinion by Judge Caldwell. It came again before this Court at Nashville, last term, and we there held that the homestead law did not apply to a joint tenancy of husband and wife.

These cases settled the law in accord with the case referred to, and many others unreported. They are sound in reason, and should be adhered to as the only proper construction of the statute. It does not matter that one was an oral opinion. It was in accord with the written one cited, and, besides, this Court, of course, adheres to principles settled, however it may be done, and does not have one law to administer orally and another in writing. The one delivered in this case was oral, but since adjournment at Jackson a written opinion has been prepared.

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In this opinion not only is the case in 1 Pickle referred to impliedly overruled, but the case of *Avans v. Everett*, 3 Lea, 76, would share the same fate if the reasoning of Judge Caldwell in this case should be adhered to when that question arises, for it is based upon authority hostile to it, and which was referred to and rejected by Judge Cooper, who delivered the opinion of the Court in the 3 Lea case. We regard the overruling of the 1 Pickle case, and the oral opinion at Nashville, as not only erroneous, but unwise in policy. We therefore respectfully, but earnestly, dissent from the present ruling.

Lurton, J., concurs in this dissent.

 Moore v. Burrow.

MOORE v. BURROW.

(Jackson. April Term, 1890.)

1. ADVANCEMENTS. *Valuation. Interest.*

Advancements of property must be valued as of the date when they are *made*, but interest is computed on that valuation only from the date of the ancestor's death.

Cases cited and approved: Burton v. Dickinson, 3 Yer., 122, *note*; House v. Woodard, 5 Cold., 200; Haynes v. Jones, 2 Head, 373; O'Neal v. Breecheen, 5 Bax., 605; Johnson v. Patterson, 13 Lea, 632; Williams v. Williams, 15 Lea, 439; Steele v. Frierson, 85 Tenn., 431.

2. SAME. *At what date made. Case in judgment.*

In 1856 B. gave his daughter a tract of land by parol, and put her in possession. In 1859 he conveyed it to her by deed, "in consideration of natural love and affection." He died several years later. In 1856 the land was worth \$3,212; and in 1859, \$4,280.

Held: That the advancement must be treated as *made* in 1856, and that the daughter is chargeable with the value of the land at that date, viz., \$3,212.

Cases cited and approved: Haynes v. Jones, 2 Head, 373; O'Neal v. Breecheen, 5 Bax., 605.

Cited and distinguished: Yancy v. Yancy, 5 Heis., 357.

3. SAME. *Interest allowed only from ancestor's death.*

And interest is chargeable upon that valuation only from the date of the father's death.

Cases cited and approved: Johnson v. Patterson, 13 Lea, 632; Williams v. Williams, 15 Lea, 439; State v. Frierson, 85 Tenn., 431.

 FROM CARROLL.

Appeal from Chancery Court of Carroll County.
A. G. HAWKINS, Ch.

Moore v. Burrow.

S. F. RANKIN for Moore.

H. C. TOWNS for Guardian *ad litem*.

JO R. HAWKINS for McKelvy.

CALDWELL, J. In 1856 John J. Burrow made a parol gift of 214 acres of land to his daughter, Harriet E. McKelvy, and placed her and her husband in possession thereof. At that time the land was worth \$3,212. In 1859 the father, "for and in consideration of natural love and affection," executed a formal deed, conveying the same land, in fee, to his said daughter. When this deed was made the land was worth \$4,280.

Thirteen years later, in 1872, said Burrow, for love and affection, conveyed to Mrs. McKelvy and her husband another tract of land, which contained 48 acres. The aggregate of the two tracts thus conveyed was 262 acres.

In 1873 John J. Burrow, by deed of gift, conveyed 600 acres of other land to his daughter, Mrs. McKelvy, and his son, George H. Burrow; subject, however, to equalization and division between them, as provided by the following clause of the deed, viz.: "But as I have heretofore given to my said daughter, Harriet, land (262 acres), I give my son, George, the greater portion of the above described 600 acres tract, so as to make them equal in point of land, which is to be settled between them soon by running out said land," etc.

The 600 acres were not divided as contemplated, but the grantor occupied and used the greater part of it until his death in December, 1887. George H. Burrow, the son, died in the meantime, intestate, leaving Mary H. and John Burrow his only children and heirs at law.

In 1888 the original bill in this cause was filed for a proper partition of the 600 acres of land between Mrs. McKelvy and the two children of George H. Burrow, deceased, according to the provision of the deed of 1873. Subsequently an amended bill was filed for the partition of other lands belonging to the estate of John J. Burrow, deceased.

Proper answers were filed and interlocutory orders made; advancements were collated and the lands partitioned under decrees of the Chancellor. McKelvy and wife have appealed.

First.—The most important question raised by appellants is whether, in the collation of advancements, Mrs. McKelvy should have been charged with the value of the 214 acres of land (\$3,212) when placed in possession thereof by parol gift of her father in 1856, or with its value (\$4,280) when she received the deed of conveyance from him in 1859. The Chancellor adjudged the latter and larger valuation to be the one with which she was chargeable, and upon that ruling her counsel assigns the first error.

Advancements in property are to be estimated at the value of the property when the advance-

ments were made. *Burton v. Dickinson*, 3 Yer., 122, note; *House v. Woodard*, 5 Cold., 200.

This is the established and reasonable rule. But, under this rule, when was the advancement of the 214 acres of land *made* in legal contemplation? In 1856, at the time of the parol gift, or in 1859, when the deed was executed? Confessedly, the parol gift communicated no title, and was revocable at any time. Nevertheless, the moment the deed was executed the title passed, and the advancement became complete and irrevocable, going back by relation to the date of the parol gift, when the possession of the land and enjoyment of its rents and profits began. The deed was in law but an affirmation and ratification of the parol gift, without change in the control and dominion of the land. Therefore, the advancement is to be treated as *made*, and accordingly valued, *at the time of the parol gift in 1856*.

This conclusion is supported by the cases of *Haynes v. Jones*, 2 Head, 373, and *O'Neal v. Breecheen*, 5 Bax., 605, wherein this Court held that children, placed in possession of lands by their parents, under parol gifts as advancements, acquired good possessory title, to the extent of inclosures, by seven years adverse possession; and, further, that they should account for the lands as advancements, *estimated at the values put upon them at the time the parol gifts were made*, not at their values when the gifts were perfected seven years later by the bar of the statute.

In those cases the advancements were completed and rendered irrevocable by the bar of the statute; in this case the same result was accomplished by the conveyance of the father, the parol donor. The advancements in those cases, after perfection, were by relation estimated at the value of the lands when the parol gifts were made; for the same reason the value of the 214 acres tract in this case should be estimated at the date of the parol gift in 1856.

The effort was made in *Yancy v. Yancy*, 5 Heis., 357, to charge the daughters of Charles L. Yancy with certain slaves as advancements. The charge was refused on the ground that title had never passed, the gift of the slaves being in parol only, and the possession by the daughters not having continued a sufficient length of time to create a bar. This Court said: "The title to the slaves continued in Charles L. Yancy, and (they) could not be charged to his daughters as advancements, unless they held them long enough to perfect their titles under the statute of limitations." *Ib.*

The date at which the value of the slaves would have been estimated by the Court, had the daughters been held to be chargeable with them as advancements, was not, and could not properly have been, adjudged in that case; hence the decision is not in point here.

Exactly the same question here might have been raised on the facts disclosed in the case of *Johnson v. Patterson*, 13 Lea, 632. Mrs. Patterson took

possession of the land in March, 1869, under parol gift from her father, President Johnson, who made her a deed of conveyance to it in February, 1873. The date at which the value of the advancement should be estimated was not determined. The point is not mentioned in the report of the case.

Second.—Error is also assigned on that part of the decree charging Mrs. McKelvy with interest on advancements from death of her father. On this point the decree is right. The rule is well settled that interest must be computed on advancements, in money or property, from the time the ancestor dies. 13 Lea, 632; *Williams v. Williams*, 15 Lea, 439; *Steele v. Frierson*, 1 Pickle, 431. This case presents no ground for an exception to the general rule.

Let the decree be modified as indicated in this opinion and affirmed in other respects. The case will be remanded for further proceedings. Cost of this Court will be paid one-half by Moore, guardian, and the other half by McKelvy and wife.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1890.

RAILWAY COMPANY v. ARNOLD.
(*Knoxville*. September 13, 1890.)

DEPOSITIONS. *Defective certificate.*

Certificate to deposition is fatally defective which shows that the deposition was reduced to writing, not by the witness or the officer taking it, but by some third person under the officer's direction.

Code construed: § 4602 (M. & V.); § 3848 (T. & S.).

FROM KNOX.

Appeal in error from Circuit Court of Knox
County. S. T. LOGAN, J.

Railway Company *v.* Arnold.

W. M. BAXTER and HENDERSON & JOUROLMON for
Railway Company.

JAMES COMFORT and L. H. SPILMAN for Arnold.

TURNER, Ch. J. The deposition of C. J. Pier-
son was objected to because of a defective certi-
ficate.

The objection was well taken, and the Court
erred in overruling it. The objectionable part is:
"The foregoing deposition was taken before me,
as stated, and reduced to writing by A. S. Dickey
by my direction."

Our statute (M. & V. Code, § 4602) requires
that the "certificate shall be substantially," etc.,
"and reduced to writing by me (or by the wit-
ness)."

The policy of the law is that one in nowise
interested shall do the writing. That one is pre-
sumed to undertake to write the language of the
witness without any desire or purpose to give col-
oring one way or the other to the meaning of
the witness, and must certify that he "is not in-
terested in the cause, nor of kin or counsel to
either of the parties."

The reduction to writing by Dickey is not a
compliance with the statute. The Commissioner's
certificate that he is not of kin or counsel does
not exclude the possibility that Dickey may have
occupied one or both relations.

The law as written will, as a rule, give the

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testimony in its purity to the Court trying the case. To enlarge its construction by permitting the officer before whom the deposition is taken to direct or employ another to write the answers, will always endanger, and sometimes pervert, the truth.

Reverse and remand.

Thompson v. McMillan.

THOMPSON v. McMILLAN.

(Knoxville. September 13, 1890.)

1. CERTIORARI AND SUPERSEDEAS. *Quashing execution satisfied in part after levy.*

To quash an execution *pro tanto*, when pressed for its full amount after satisfaction in part subsequent to levy, *certiorari and supersedeas* is a proper remedy.

Cited: Car. Hist. Lawsuit, Secs. 549, 550.

2. SAME. *Same. Facts constituting satisfaction in part.*

After levy of execution issued upon a Magistrate's judgment for \$92.25 and costs, the creditor agreed to accept, in full satisfaction of his judgment, the payment of \$50 to himself, his attorney's fee, and the costs of the cause. The debtor paid the \$50 to his creditor and all costs, taking receipt against the entire judgment. He disputed the amount of the attorney's fee, and failed to pay it. He tendered \$10 to the attorney, but the true amount was \$25.

Held: That the judgment was satisfied, and the execution should have been quashed, except as to the amount of \$25 due to the attorney, with interest.

3. SAME. *Same. The proper judgment.*

Where an execution which has been satisfied in part only, has been superseded *in toto*, the Court, after quashing it as to the satisfied part, will not remand and award *procedendo* as to remainder, but will enter judgment upon the bond for *supersedeas* therefor.

Code construed: §§ 3852, 3853, 3854 (M. & V.); §§ 3136, 3137, 3138. (T. & S.).

Cases cited and approved: Mallett v. Hutchinson, 1 Head, 558; Littleton v. Yost, 3 Lea, 269.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. CHARLES NELSON, Sp. J.

Thompson v. McMillan.

SAYLOR & MOORE for Thompson.

J. C. FORD for McMillan.

CALDWELL, J. McMillan sued Thompson before a Justice of the Peace, and obtained a judgment for \$92.25 and costs of suit. Execution was issued and levied on personal property belonging to Thompson.. He gave a delivery bond, and the property was advertised for sale.

Before the day of sale arrived an agreement was made whereby McMillan was to receive \$50 in satisfaction of the judgment, Thompson to pay, in addition thereto, the costs and McMillan's attorney's fees.

In pursuance of this agreement, the \$50 were paid, and McMillan executed his receipt to Thompson for the full sum of \$92.25. Thompson also paid the costs, and offered to pay McMillan's attorney \$10 as his fee. This sum was declined by the attorney, who claimed that his fee should be \$25. Thompson refused to pay more than the \$10 to the attorney, claiming that such sum would be full compensation for the services rendered.

The execution had not been returned in the meantime, nor had any credit been indorsed upon it; but the Constable still retained it, subject to instruction from McMillan, and presumably for the purpose of selling the property in case Thompson should not pay the \$25 claimed by McMillan's attorney.

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At this stage of the case, three days before the time the sale was to occur, Thompson filed his petition in the Circuit Court for writs of *certiorari* and *supersedeas*, alleging that what had transpired operated as a full satisfaction of the judgment, and praying that the execution be quashed.

When the papers were returned to the Circuit Court, McMillan appeared and made an unsuccessful motion to dismiss the petition. Thereupon, the case came on to be heard on the motion of Thompson to quash the execution, and on an issue of payment or no payment, based on the facts alleged in the petition. Jury was waived, and the issue submitted to the trial Judge upon full proof on both sides.

Besides the facts already stated, it was shown that McMillan, at the time of the employment, agreed to pay his attorney a fee of \$25, and that he was bound to him for that amount when the agreement of compromise was made with Thompson. The *amount* of this fee was not mentioned between McMillan and Thompson; the latter simply bound himself *to pay the fee, whatever it might be*.

The compromise was made and the \$50 were paid on November 21, 1889; and, by the agreement, the fee was to be paid on the same day.

The Circuit Judge found the issue in favor of McMillan, overruled the motion to quash, awarded a *procedendo* to the Justice of the Peace, without allowing any credit whatever, and adjudged costs against Thompson.

Thompson v. McMillan.

Motion for new trial was overruled, and Thompson appealed in error.

The remedy resorted to by Thompson, and the issue formed in the Circuit Court, were proper, whether the payments made were in law an extinguishment of the entire judgment or only a satisfaction *pro tanto*, and he should clearly have had relief in one view or the other. Caruthers' History of a Lawsuit, Secs. 549, 550.

McMillan owed his attorney a fee of \$25. Thompson bound himself to pay that fee. When he does so he is entitled to the full benefit of the compromise agreement—a satisfaction of the judgment. The tender of \$10 was of no virtue, because that was not the amount due.

By the earlier practice, the Circuit Court should have ascertained the amount of the credits, and awarded a *procedendo* to the Magistrate for the balance; but, under the Code, it should have rendered such final judgment as the merits of the case required, without remanding the case at all. Code (M. & V.), §§ 3852, 3853, 3854; *Mallett v. Hutchinson*, 1 Head, 558; *Littleton v. Yost*, 3 Lea, 269.

Reverse, and enter judgment here for McMillan against Thompson and surety on his bond for *superseatas* for the sum of \$25, with interest from November 21, 1889, this to be in full of balance of Magistrate's judgment. Thompson will pay costs of Circuit Court, and McMillan costs of this Court.

Railway Company v. Smith.

RAILWAY COMPANY v. SMITH.

(Knoxville. September 16, 1890.)

1. RAILWAY COMPANY. *Not liable for injury to brakeman, when.*

For injury received by brakeman while engaged in making coupling, under order of his engineer, between his own and another section of a freight-train, the railway company is not responsible, where it appears that a conductor was in charge of the train on which the brakeman was employed, and by which he was struck and injured; and that the brakeman knew that it "was dangerous and reckless, and against the rules and orders of the company" to make such coupling; and it further appears that the injury was not attributable to defects in the company's road-bed or machinery, nor to incompetent servants.

2. SAME. *Same. Erroneous and misleading charge.*

In a case where it is clear that a conductor was in charge of the train, and the engineer and brakeman therefore fellow-servants, it is misleading and erroneous for the Court, in his charge, to state imaginary cases in which the engineer might become the superior of the brakeman.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. L. A. GRATZ, Sp. J.

W. M. BAXTER and HENDERSON & JOUROLMON for
Railway Company.

INGERSOLL & PEYTON for Smith.

LEA, J. Smith was front brakeman on a
freight-train, going from Knoxville to Bristol, on

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the night of January 22, 1889. He was riding on the engine with the engineer. In going up a grade near Greenville, they came near the first section of a freight-train, they being the second section. The first section was moving very slowly, and seemed about to stop. When within thirty or forty feet of the caboose, Smith says the engineer told him to make the coupling, in order to push the first section over the grade; that such an order had been previously given a mile back, and he refused to make such a coupling while the first section was moving.

He says he thought the first section had stopped when he left the engine to make the coupling. He went out over the engine and upon the ground, and went forward and climbed into the caboose of the first section, secured a coupling-pin, placed it in the draw-head of the caboose, and then walked back to the pilot of the engine, got upon it, lifted up the draw-bar, signaled his engineer to come ahead, when the engineer told him, "Never mind, they are gone." He then dropped the draw-bar, when his foot slipped, and he fell to the ground, and was run against by the pilot, thrown from the track, and hurt.

The first section was moving when he went into the caboose and when he left it; and the conductor of the first section told him, while in the caboose, not to hitch on to his train, as he would soon be over the grade. This, Smith says, he did not hear.

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For the injuries received, this suit is brought. He had been in the employment of the company for some time as brakeman. The coupling apparatus was all right. Nothing was the matter with the machinery or with the track; all were in good order.

It was his duty to make couplings, and he had often done it before. He insists the only objection to the engine was that there was only a small "slot" in which a part of the foot could be placed. It was known as a "Jack" engine. It is a modern engine, and experts say the style of the pilot was the best and safest for removing obstructions from the track. These engines are used altogether upon the company's road.

Upon the second section there was a conductor in charge of the train. Both trains were moving when he was preparing to make the coupling.

He states that he refused to make the coupling when first ordered by the engineer, because it was dangerous and reckless, and against the rules and orders of the company to make a coupling with a moving train.

Upon this statement of facts the plaintiff below was not entitled to a recovery. If he was ordered by the engineer to make the coupling to the moving train (which the engineer denies), he was not in duty bound to do so, as he says the rules and regulations of the company forbid him to couple to a moving train.

Again, the engineer and brakeman upon the

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same train, the conductor being in charge thereof, were fellow-servants engaged, as in this instance, in the same common duty, to wit: the coupling of the trains.

The company is not liable for the negligence of either by which the other is injured, there being no proof of the incompetency of either to discharge the duties for which they were employed by the company.

The next assignment of error is upon the charge of the Court. The Court correctly charged the law in regard to fellow-servants, and then said to the jury, "I can well imagine a case, and you can, also, where the engineer might be master." This was error.

The special Judge then proceeded to imagine one or more cases, though all the proof in this case showed that the conductor was in charge of the train, all of which tended to confuse the jury, and we are unable to tell to what extent they proceeded to exercise their imagination.

Let the judgment be reversed, and the case remanded.

Marble Company v. Black.

MARBLE COMPANY v. BLACK.

(Knoxville. September 16, 1890.)

1. PLEADING AND PRACTICE. *Amended declaration. Recital of leave to file.*

Where the record elsewhere shows that leave was "granted to amend the declaration," it is not essential that the amended declaration recite, upon its face, that it is filed by leave of the Court.

2. SAME. *Same. Profert of letters of administration.*

When the original declaration makes profert of the plaintiff's letters of administration, it is not essential that the amended declaration repeat such profert.

3. SAME. *What is sufficient profert of letters of administration.*

Profert of letters of administration is sufficiently made where the declaration avers the plaintiff's representative character, and adds: "Letters of administration being here shown to the Court."

4. SAME. *Objection to profert comes too late when first made in Supreme Court.*

Objection to profert, or for want of it, comes too late when made for first time in this Court, after plea to and trial upon the merits.

Cases cited and approved: *Union Bank v. Osborne*, 6 Hum., 319; *Lowry v. Medlin*, 6 Hum., 451; *Walt v. Walsh*, 10 Heis., 316.

See Code, §3599 (M. & V.); §2893 (T. & S.).

5. SAME. *Issue and evidence as to plaintiff's representative character.*

Unless the plaintiff's averred representative character is put in issue by special plea, no proof on that point is essential. That fact is admitted by the general issue.

Cases cited: *Cheek v. Wheatly*, 11 Hum., 556; *Glass v. Stovall*, 10 Hum., 453; *Fowlkes v. Railroad*, 9 Heis., 829.

See Code, §3620 (M. & V.); §2910 (T. & S.).

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6. SUPREME COURT PRACTICE. *Charge of Court not part of record, when.*

Charge of Court is not part of the record, though copied into it, where it follows the bill of exceptions, and is not therein referred to.

Cases cited: Railroad v. Foster, 88 Tenn., 673; Huddleston v. State, 7 Bax., 55; Bass v. State, 6 Bax., 583; McGhee v. Grady, 12 Lea, 90; Owens v. State, 16 Lea, 1.

7. SAME. *Will not reverse upon the facts, when.*

The Court reviewed at length the facts of the case, and refused to disturb the verdict on the assignment of error that it was not sustained by the evidence.

8. CONTRIBUTORY NEGLIGENCE. *Not imputable, when.*

The doctrine re-affirmed which is held in Railroad v. Gurley, 12 Lea, 47, that one who has been placed in a position of danger by another's fault or negligence will not be denied relief for injury resulting therefrom, by reason of the fact that he, "in the excitement of the moment, lost his presence of mind, and, in an honest effort to save his life, by mistake pursued the course to lose it."

FROM KNOX.

Appeal in error from Circuit Court of Knox County. S. T. LOGAN, J.

S. G. HEISKELL, HENDERSON & JOUROLMON, and
N. N. OSBORNE for Marble Company.

CHARLES NELSON and CALDWELL & MYNATT for
Black.

CALDWELL, J. While in the employment of the
McMillan Marble Company, William Shrum received

physical injuries from which he died. E. C. Black, as administrator of said Shrum's estate, brought this action of damages against the marble company for the wrongful killing of his intestate, and recovered a judgment for \$2,500. The marble company appealed in error to this Court, and has here assigned several grounds for reversal and new trial.

First.—The assignment made on the ground that the amended declaration fails to show that it was filed by leave of the Court, is bad, because the record recites that leave was “granted to amend the declaration.”

Second.—The assignment claiming that neither the original nor the amended declaration tendered the plaintiff's letters of administration, is as obviously not well taken.

It is averred in the original declaration that the plaintiff had been duly qualified as administrator of William Shrum, deceased, and after that averment profert is made in the usual form—“Letters of administration being here shown to the Court.” The amended declaration, being but an additional count to the original declaration, was good without a repetition of the profert.

Moreover, the objection comes too late, being made for the first time in this Court. If there had been no profert at all, the defendant could have taken advantage of that fact by demurrer only. Failing to do that, and pleading to the merits, he waived the objection. Code (M. &

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V.), § 8599; Caruthers' H. of L., Sec. 199; *Union Bank v. Osborne*, 6 Hum., 319; *Lowry v. Medlin*, *ib.*, 451; *Walt v. Walsh*, 10 Heis., 316.

Third.—It is also urged that this Court should reverse the judgment, and grant a new trial, because the plaintiff failed to produce his letters of administration as proof on the trial in the Court below. There is no answer in the record to this assignment, as there is to the two just mentioned.

The bill of exceptions, which purports to contain all the evidence, fails to show any proof of plaintiff's qualification as administrator of the deceased; hence it is conclusively presumed that no such proof was adduced. Nevertheless, this assignment is bad in law under the pleadings in this case. The plaintiff averred his authority to maintain the suit as personal representative of the deceased, by stating that he had been duly qualified as administrator on a certain day by the County Court of Knox, County, and making profert of his letters of administration.

The defendant made a general denial by a plea of not guilty, and on this plea went to trial.

This plea of the general issue admitted the plaintiff's right to the representative character in which he sued, and rendered it unnecessary for him to make proof of his appointment and qualification; it was an admission that he was what he assumed to be—the administrator of the deceased. That he rightfully possessed that charac-

ter, the defendant could call in question only by a special plea of *ne unques* administrator.

This rule is well settled, the only conflict of decision being as to its application where the cause of action accrued after the death of the deceased. *Cheek v. Wheatly*, 11 Hum., 556; *Glass v. Stovall*, 10 Hum., 458.

With Judge Totten, who delivered the opinion in the *Cheek* case, *supra*, we can see no reason why the rule of practice should not be uniform, and apply in the same manner where the cause of action originated after as before the decease of the intestate. But the case at bar is not of that class of cases concerning which the conflict of decision exists; for here the cause of action accrued on the day before the death, when the injuries were inflicted. *Fowlkes v. Railroad Company*, 9 Heis., 829.

Fourth.—Errors are assigned on certain portions of the charge of the trial Judge to the jury. These cannot properly be considered, because the charge is not before this Court. What seems to have been the Court's instruction to the jury is copied into the transcript, but it appears after the conclusion of the bill of exceptions, is in no manner connected with it, or otherwise made a part of the record. No rule is more familiar and better settled than that which impels this Court to disregard such a paper altogether. *Railroad Companies v. Foster*, 4 Pickle, 673; 7 Bax., 55; 6 Bax., 583; 12 Lea, 96; 16 Lea, 1.

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Fifth.—The assignment that the verdict is against the charge of the Court is bad for a similar reason. In the absence of the charge, it cannot be determined whether or not it was duly regarded by the jury in making up their verdict.

Sixth.—The only other assignment of error is based upon the contention that the verdict is not sustained by the evidence; that the facts of the case show no negligence on the part of the defendant.

This makes it necessary to notice the material parts of the evidence somewhat in detail. The defendant company was operating a marble quarry in Knox County. The deceased, a young boy fifteen and a half years old, was one of its employes. He was an obedient and faithful hand. On the day of the accident he was, by special direction, digging the dirt from one of several rocks in a "bank" from fifteen to eighteen feet high. This rock seems to have been at the base of the bank, and was only about four feet out of the downward range of another rock, which projected from the bank several feet above. From some unexplained cause this projecting rock fell, and, in its fall, struck young Shrum and inflicted such injuries upon him that he died the following day. The falling rock attracted his attention, and in his effort to escape he ran in its course and was crushed. Had he run in any other direction, as he might have done, or had he kept his place, he would have been uninjured. These facts are established by several witnesses, and from them it

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is contended that the company was without fault, and the deceased alone brought about his destruction. Nothing else appearing, this conclusion would seem to be irresistible. Facts yet to be stated, however, materially change the legal aspect of the case. Among the various dangers incident to quarrying is that of projecting rocks, which often "slip" or fall. This danger is so great that it is made the duty of the foreman "to go around and test" such rocks, and have them removed when they become dangerous. So important was this work of removal, and so necessary to the protection of the employes, that any of the hands were at the foreman's command for its performance. The rock whose fall was so disastrous to this young boy had not been tested at all; yet the superintendent of the company put him to work near by—so near that its sudden falling would naturally, if not inevitably, have alarmed and put to flight a person of more mature years. It was not only reasonable that *the deceased* should believe himself in danger, and, therefore, seek safety in flight, but *others* who witnessed the falling of the rock and his situation, were of the same opinion, and called to him "to get out of the way." He was not at fault for accepting work, under direction of his superior, so near this dangerous rock; for the projection was so patent to all that he had a right to assume that the foreman had tested it and found it safe, and that the superintendent would not otherwise send him to such a place.

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To our minds, these facts abundantly sustain the verdict. The failure to test and remove this impending rock, and the placing of this young boy in such close proximity to it, are facts from which an intelligent jury may well have imputed negligence to the marble company. Indeed, we do not see how they could reasonably have reached any other conclusion.

That the deceased, in the excitement of the moment, lost his presence of mind, and, in an honest effort to save his life, by mistake pursued the course to lose it, is no excuse for the negligence of the defendant which caused the disaster. *Railroad v. Gurley*, 12 Lea, 47.

The statement of one of the defendant's witnesses that he saw fresh marks of a pick under the rock that fell, and that the deceased must have been digging there at the time, and in that way caused it to fall, was probably not credited or given much weight by the jury. It was opposed by the fact that the boy's pick was found in its proper place and position, "sticking" in the ground by the other rock where he was directed to work.

Let the judgment be affirmed.

Sword v. Young.

SWORD v. YOUNG.

(Knoxville. September 18, 1890.)

1. COMMON CARRIER. *Liable to consignor for value of goods negligently delivered to fraudulent purchaser.*

Common carrier is liable to consignor for value of goods shipped upon a fraudulent order to a fictitious consignee, and delivered by the carrier to the person who had made the fraudulent order and obtained the bill of lading without inquiry or knowledge as to his identity.

Cases cited: 1 Lawyer's Reports, Annotated, 650; 50 N. Y., 213 (10 Am. Rep., 475); 4 Bing., 476.

2. SAME. *Same. Carrier's liability secondary.*

But the carrier's liability is postponed to that of the fraudulent purchaser and his confederates, where they are jointly sued.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

COOPER & DAVIS for Sword.

WILLIAMS & HENDERSON for Young.

J. W. CALDWELL for Garland.

W. M. BAXTER and HENDERSON & JOUROLMON for
Railroad Company.

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TURNEY, Ch. J. On May 18, 1889, J. F. Gillenwaters, over the assumed and fictitious name of "Charles G. Magrauder," wrote to Sword & Son, of Cleveland, Ohio, to send to them (representing Magrauder as a firm name) a brick machine. The machine was shipped, and came to Knoxville on the cars of defendant, East Tennessee, Virginia, and Georgia Railroad. Shortly after its arrival Gillenwaters presented the bill of lading made in the name of "Charles G. Magrauder," demanded the machine, which was delivered to him, paid the freight, and receipted in the name of Charles G. Magrauder. No questions were asked, and he was not required to identify himself as the consignee, nor was the bill indorsed.

Defendant Garland claims to have purchased the machine from his brother-in-law, Gillenwaters. He afterward sold it to Young & Tindall. Complainants were, of course, never paid the price for the machine, and now sue the defendants, Gillenwaters and Garland, Young & Tindall, and the railroad company.

There can be no question of the liability of Gillenwaters and Garland. Was the conduct of the carrier such as to amount to a conversion and make it liable? It is a well-settled general rule that the carrier must deliver to the consignee at the place appointed.

Chancellor Kent declares the law to be that "a common carrier is in the nature of an insurer, and is answerable for accidents and thefts, and

even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God and public enemies. This has been the settled law of England for ages, and the rule is intended as a guard against fraud and collusion, and is founded on the same broad principles of public policy and convenience which govern in the case of inn-keepers. This principle of extraordinary responsibility was taken from the edict of the praetor in the Roman law, and it has insinuated itself into the jurisprudence of all the civilized nations of Europe." 2 Kent, 805, 9th Ed.

This is equally the rule in this country. It can make no difference that the defendant carrier thought, because Gillenwaters had the bill of lading, that he was Charles G. Magrauder. If he was a stranger, as the proof shows him to be, it was the duty of the carrier to have required him to identify himself as the consignee or his rightfully-constituted agent. By its failure, Gillenwaters was enabled to practice that fraud intended to be guarded against by the rule from Kent, as well as a theft, or its equivalent—the obtaining of the goods by false pretenses.

That Gillenwaters had succeeded in deceiving the complainants by representing himself as Magrauder, is no excuse to the defendant for its failure to use an effort to discover his true character.

The consignment was to Charles G. Magrauder. That name was fixed on the machine, and it was

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a duty to deliver to him only, or, if he could not be discovered, to notify the consignor.

There is no difference between this case and one in which a consignment has been made to an actual person, and the goods delivered by accident, mistake, or carelessness to a cheat who represents himself as the real consignee. It is necessary in both to have proof of identity or authority to receive.

We have no doubt of a confederacy between Gillenwaters and Garland. The decree will be against them, in the first instance, for the value of the machine; then against the carrier. A majority of the Court holds that no decree can be had against Young & Tindall.

Modify the Chancellor's decree accordingly.

OPINION ON PETITION TO REHEAR.

(October 4, 1890.)

TURNER, Ch. J. This case was decided at a former day of the term, and is again before us on a very earnest and respectful petition to rehear.

The facts are set forth in the former opinion.

The authorities cited do not, in our opinion, when taken connectedly, support the petition. We had examined the case of *Weyand & Atchison v. Railway Co.*, as reported in Lawyer's Reports, An-

notated, Vol. I., 650. It is to that case Mr. Freeman has added his notes in 9 American Rep.

In that case the Court said: "This case does not fall within the rule that where one of two innocent parties must suffer, the loss must fall upon him who put it in the power of another to perpetrate the wrong," and adds: "The possession of the bill of lading without indorsement or other evidence of assignment, did not vest Evans with any apparent right to the property. The loss resulted from the negligence of the defendant in not insisting upon proper evidence of an assignment before it surrendered the goods."

In *Price v. Oswego and Syracuse Railroad Co.*, 50 N. Y., 213, and 10 Am. R., 475, it was held "where goods which have been fraudulently ordered by an individual in the name of a fictitious firm, and have been shipped in compliance with the order, directed to such firm, are delivered by the carrier to a stranger without requiring evidence of his identity, the carrier is liable to the consignee for their value," the Court saying: "In the present case the goods were consigned to S. H. Wilson & Co., Oswego."

This plainly indicated some person, or rather persons, known by and doing business under that name. But as there was no such firm, and, so far as the findings or case show, never had been, delivery could not be made to the consignees. Then, as already seen, it became the duty of the carrier to warehouse the goods for the owner.

Instead of this, the defendant delivered them to a stranger without making any inquiry as to who or what he was."

The Court cites *Stephenson v. Hart*, 4 Bing., 476, in which "it was expressly held that the carrier had no right to make delivery to the writer of the fictitious order," and adds: "But it is said that the plaintiff intended the goods should be delivered to the writer of the order. Not at all. He did not consign them to the writer of any order, but to Wilson & Co. This is the only evidence of his intention as to the person to whom the delivery should be made. It is further said that it was the plaintiff's negligence in forwarding the goods without ascertaining that there was in fact such a firm. I am unable to see what the defendant had to do with this. Its duty was to deliver to the firm, and, if that could not be found, to warehouse and keep for the owner."

That case is at one with the present. It is sound in principle, and in consonance with right.

The petition is dismissed.

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McBEE v. BOWMAN.

(Knoxville. September 20, 1890.)

1. DEVISAVIT VEL NON. *Opening and closing argument.*

Upon trial of an issue of *devisavit vel non* the proponent's attorneys are entitled to open and close the argument, although contestants admit of record the due execution of the particular will propounded, and seek to show its revocation by the execution of a subsequent will, whose genuineness is controverted.

Cases cited and approved: *Puryear v. Reese*, 6 Cold., 25; *Porter v. Campbell*, 2 Bax., 83; *Alloway v. Nashville*, 88 Tenn., 527, 528.

2. SAME. *Proof of forgery of will. Preponderance sufficient.*

Upon trial of an issue of *devisavit vel non*, in which the proponent asserts the forgery of a revoking will, it is error for the Court to charge that the fact of forgery must be proved by any greater preponderance of evidence than ordinarily obtains in civil cases. Slight preponderance is sufficient in such case.

Cases cited and approved: *Chapman v. McAdams*, 1 Lea, 500; *Gage v. Railway Companies*, 88 Tenn., 726.

Cited and distinguished: *Coulter v. Stuart*, 2 Yer., 226.

Cited and overruled: *Hills v. Goodyear*, 4 Lea, 236.

3. SAME. *Same. Particular charge erroneous.*

Instructions to jury in such case that the forgery may be established by "a preponderance" or by "the weight" of the testimony became erroneous when followed and explained by this language: "It [the forgery] should appear with reasonable certainty." Reasonable certainty excludes reasonable doubt.

 FROM KNOX.

Appeal in error from Circuit Court of Knox County. CHARLES NELSON, Sp. J.

McBee v. Bowman.

WEBB & McCLUNG for McBee.

WILLIAMS & SNEED and WAT M. COCKE for Bowman.

CALDWELL, J. On June 19, 1874, Samuel Bowman died in Knox County, and in July of the same year a certain paper-writing, dated January 6, 1872, was duly admitted to probate, in common form, as his last will and testament. By this instrument the whole of the testator's large and valuable estate, consisting of both realty and personalty, was given *absolutely* to his son, James Wiley Bowman, who disposed of all of it in his life-time.

James Wiley Bowman died on March 30, 1889, and in July following his children and grandchildren filed their petition in the County Court of Knox County, seeking to have the probate of said instrument of January 6, 1872, annulled, and to have a certain other paper-writing of later date (March 2, 1872) probated as the last will and testament of said Samuel Bowman, deceased.

By the terms of the latter instrument the testator devised his real estate to his son, James Wiley Bowman, *for life only*, with remainder to the son's children.

R. L. McBee was made party defendant to the petition, because he claimed ownership of a valuable portion of the real estate, under deed from James Wiley Bowman. He filed his answer, resisting the relief sought in the petition on the

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alleged ground that the paper already probated was in fact the last will and testament of Samuel Bowman, deceased, and that the one presented by petitioners was a forgery.

Proper certification was made to the Circuit Court, where an issue of *devisavit vel non* was made up and submitted to a jury. Verdict was returned in favor of the paper dated March 2, 1872, and the Court adjudged it to be the last will and testament of Samuel Bowman, deceased.

McBee has appealed in error.

The first error assigned is upon the action of the Court in permitting the counsel of appellees, over the objection of appellant, to open and close the argument before the jury.

The general rule is that the plaintiff, or the party having the affirmative of the main issue, is entitled to the opening and closing. The proponent of a will is the plaintiff; he has the affirmative in an issue of *devisavit vel non*; the burden is upon him to produce the instrument propounded as a will, and to prove its due execution as such. Therefore, under the rule stated, he is entitled to open and close the argument. Caruther's H. of L., Sec. 776; *Puryear v. Reese*, 6 Cold., 25; *Porter v. Campbell*, 2 Bax., 83.

It is sought to take this case out of the operation of the general rule by reference to the fact that in the making up of the issue for the jury it was admitted of record that the will of January 6, 1872, was duly executed.

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This admission did not change the affirmative of the issue, or change the rights of the parties in the discussion to be made before the Court and jury. It simply dispensed with the production of proof which would otherwise have been required of the proponent, and stood in its room and stead. 2 Bax., 83.

That the burden of proving a revocation by the execution of a later will was then assumed by the appellees did not make them plaintiffs in fact, nor give them the rights of plaintiffs in the case. Starting out as plaintiff, McBee continued to occupy that relation through the entire trial, and was rightfully entitled to the benefit of opening and closing the argument, though the burden of proof was shifted from him in the progress of the case. *Alloway v. Nashville*, 4 Pickle, 527, 528.

It is also urged in support of the action of the trial Judge, that the peculiarity of the issue in this case gave appellees the right to open and close; that the paper-writing of March 2, 1872, was in fact the one under contest, and that they were before the Court as proponents.

This position cannot be successfully maintained. It is true that this case is unlike the usual one, in that the life of one paper, whose due execution and genuineness are conceded, is attempted to be destroyed by the establishment of a later one; and that in the issue submitted to the jury, appellees affirmed and appellant denied that the later paper was the last will and testament of the testator.

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But this was only an incidental question, raised for the purpose of showing a revocation of the older paper, which had once been admitted to probate in common form, and which the records of both the County and the Circuit Courts recite was the paper contested. The order of the County Court directing that the cause be certified to the Circuit Court, begins by stating that "this is a proceeding to contest the will of Samuel Bowman, deceased, dated January 6, 1872." The issue of *devisavit vel non*, as made up in the Circuit Court, begins thus: "This is a contest of the will of Samuel Bowman, deceased, dated January 6, 1872."

Thus it is shown that in fact, as in law, the primary matter of contestation was the will of January 6, 1872. As to that McBee stood in the attitude of proponent and plaintiff. Therefore, under the general rule of practice, whose wisdom is too manifest to admit of question, he had the right to the opening and closing argument, notwithstanding the fact that the result of the contest depended on the validity or invalidity of the other instrument, concerning which by far the greater part of the testimony was introduced.

In the next place we will consider the assignment of error made upon that portion of charge relating to the *quantum* of evidence necessary to establish forgery in this case. It has already been stated that McBee's contention was, as against the paper produced by appellees, that it was a forgery. The forgery, as insisted by him, consisted in the

fraudulent changing of the date of that paper from March 2, 1869, to March 2, 1872. This he contended was apparent on the face of the paper, as well as established by other proof.

As applicable to this contention, the trial Judge instructed the jury that the same "strictness of proof" was not required to establish the forgery in this case as would be required in the trial of the offender on an indictment for the crime. His Honor then continued: "It can be established like any other issue of fact in a civil case, and that is by a preponderance of the testimony. This does not mean that it shall be established by the greater number of witnesses, but the character of the testimony, the means of knowledge the witnesses may have of the facts to which they testify, and all other circumstances being considered; or, in plain language, by the weight of the testimony, and this burden is upon the party alleging it. A jury, before passing upon an act considered as forgery, should do so with the full knowledge of the nature of the crime imputed and of all the facts surrounding it. It should appear with reasonable certainty that such is the case."

Aside from the question as to the *burden* of proof, it is insisted for appellant that the foregoing instruction placed too great a *weight* of proof on him—required him to establish the forgery by a greater weight of evidence than the law demands.

It will be observed that the jury was instructed

that the charge of forgery in this case could be established by "a preponderance of the testimony;" or, in other words, "by the weight of the testimony," and then his Honor concludes his instruction on this subject with the language: "It [the forgery] should appear with reasonable certainty."

This last utterance is to be taken as a definition of what had gone before on the same point, as an elucidation and summing up of the rule by which the jury was to be governed; and, to our minds, the whole instruction means, and was intended to mean, that, to establish the charge of forgery, it was incumbent on McBee to show the fact by that degree of preponderance or weight of testimony necessary to produce conviction of its existence with reasonable certainty. Or, to state the point even more briefly, McBee was required to prove the forgery "with reasonable certainty."

The instruction is manifestly erroneous. Reasonable certainty implies the absence of reasonable doubt. Telling a jury that they must be convinced of a fact *with reasonable certainty* is almost, if not quite, the same as telling them that they must be convinced of it *beyond a reasonable doubt*.

The distinction between criminal and civil cases, in respect to the degree or quantity of evidence necessary to justify a verdict for the plaintiff, is well settled. In civil cases a preponderance is all that is required. But in criminal cases the guilt of the accused must be shown beyond a reasonable doubt. 1 Green. on Evi., Sec. 13a; 3 Green. on

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Evi., Sec. 29; 2 Wharton on Evi., Sec. 1245; *Chapman v. McAdams*, 1 Lea, 500; *Hills v. Goodyear*, 4 Lea, 236; *Gage v. Railway Companies*, 4 Pickle, 726.

In the last of these cases, language similar in import to that under consideration here was held to devolve upon the plaintiff the necessity of making out his case beyond a reasonable doubt. 4 Pickle, 726.

The learned special Judge who tried the present case in the Court below, recognized the general distinction mentioned, but he seems to have regarded this case as one furnishing an exception to the general rule in civil cases, because the issue involved a charge of moral dereliction. In treating this as an exceptional case, and giving the exceptional instruction, he was within the authority of *Hills v. Goodyear*, 4 Lea, 236, where this Court declined to reverse on account of a charge in which the trial Judge told the jury "that, inasmuch as the facts set up as a defense involved serious charges of moral dereliction on the part of the plaintiff, they must be established clearly, and to the entire satisfaction of the jury." Naturally and properly, the learned counsel for appellees now cite and rely on that case to sustain the instruction of the Court in this one; and so it does. But, believing the decision on that particular point to be without support in authority and unsound in principle, we are constrained to overrule it and adhere to the old and familiar rule already an-

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nounced. This case presents no ground for an exception to that rule. It is unquestioned that in a case like that one, or like this, the party charged with a great moral wrong may, in addition to his other proof, introduce evidence of his good character and invoke the legal presumption of innocence. 1 Bax., 370; 2 Heis., 213; 1 Tenn., 488.

All these must go into the scales on his side of the case, and the aggregate of evidence thus produced must be overcome by proof of the opposite party before the verdict can properly go against him; but, at the same time, a mere preponderance of the evidence is sufficient to justify that result. Only enough evidence to turn the scales need be adduced by the other party. The *amount* of evidence requisite to his defeat must be greater than in the ordinary civil case, because he has placed more weight in his side of the scales; but the required *degree of preponderance* is the same. The degree of conviction in the minds of the jury may be the same where there is a charge of crime in a civil case as where there is no such charge, though more evidence is necessary to overcome opposing testimony and produce that conviction in the one case than in the other. A preponderance in either case is sufficient.

One exception to the general rule was recognized by this Court in the case of *Coulter v. Stuart*, 2 Yer., 226, as early as 1828. In that case it was decided, on good authority, that a

plea justifying a charge of perjury in a civil action for slander must be sustained by the same *quantum* of proof as would be required to convict in a criminal prosecution.

We do not deny the soundness of that holding; that question is not before us. This case does not fall within that exception. We do not think another exception should be made, or that the one already established should be extended to embrace a case like this one. Hence, the recent case of *Hills v. Goodyear*, 4 Lea, 286, is disapproved.

For the errors mentioned, the judgment is reversed, and the case remanded for a new trial.

Judge Lea did not sit in this case.

Carpenter v. Franklin.

89 142
110 645

CARPENTER v. FRANKLIN.

(Knoxville. September 20, 1890.)

1. HUSBAND AND WIFE. *Husband's gift of personalty to wife creates in her a separate estate.*

Direct gift of personalty from husband to wife during coverture creates in her a separate estate by implication, without words of limitation to her sole and separate use.

Cases cited and approved: *Powell v. Powell*, 9 Hum., 477; *Templeton v. Brown*, 86 Tenn., 50; *McC Campbell v. McC Campbell*, 2 Lea, 663; 3 P. Wms., 334.

2. SAME. *Same. Wife's earnings and savings become her separate estate, when.*

Earnings and savings of the wife, the fruits of her own toil, frugality and self-denial, become her separate estate, without any express gift or contract of the husband, where she is permitted to receive and retain them, and to loan and invest them in her own name for her own benefit.

3. SAME. *Husband's creditors have no right to wife's earnings. Gift to wife not fraudulent.*

The husband's creditors have no right to compel the application of the wife's earnings—the fruits of her own toil—to the payment of his debts, and therefore the husband's assent that those earnings shall become her separate estate, and be invested in her name and for her benefit, is valid even as to his existing creditors.

Case cited and approved: *Leslie v. Joiner*, 2 Head, 513.

4. SAME. *Wife's savings protected from husband's creditors, when.*

Not even existing creditors of the husband can compel the wife to surrender her savings, insignificant in amount, accumulated as the result

Carpenter v. Franklin.

of self-denying frugality from monthly allowances, reasonable in amount, paid her out of the husband's monthly wages to meet her own and the family expenses.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

TAYLOR & HOOD for Carpenter.

INGERSOLL & PEYTON for Franklin.

LURTON, J. This is a bill by creditors of Matt Franklin to subject to the satisfaction of their debts a house and lot, the title to which is in his wife. This property was bought by Mrs. Franklin, in 1886, for the price of \$1,900, and the title was taken in her own name. She paid at the time the sum of \$800, and gave the notes of herself and husband for the remainder, payable in one and two years. This bill was filed in August, 1889, at which time these notes had been paid.

Complainants became creditors some time after the purchase of this property, but before the payment of the deferred notes. The bill charges that the money procured by Matt Franklin upon certain notes indorsed by them for his accommodation was used in paying off the last of the pur-

chase-money. This charge is denied, and there is no proof to sustain it.

The bill further charges that the purchase-money paid for the property was paid by their debtor, Matt Franklin, and the title taken in his wife's name for the fraudulent purpose of defeating his creditors. There is no proof of fraud in fact upon the part of either husband or wife, and complainants' bill must be sustained, if at all, upon the ground that the conveyance to the wife was a voluntary settlement by the husband upon the wife, and void as to existing creditors.

Complainants took the proof of both Mr. and Mrs. Franklin, and rely upon it to support their case. From this proof it appears that the entire purchase-money has been paid by the wife from a fund slowly accumulated during a period of eighteen years, as a result of her great economy, and earnings made in keeping boarders and as a seamstress, together with her savings from time to time of small sums given her by her husband, or saved by her out of her personal or household expense fund.

Mr. Franklin was a railroad engineer, and in receipt, for about sixteen years, of wages averaging \$120 per month. The management of his household, from his necessary absence, seems to have fallen almost wholly upon his wife. He was accustomed to turn over to her each month one-half of his wages to be used by her for her personal and household expenses. Whatever she was

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by economy enabled to save from this allowance of her husband for personal and household expenses, she retained and claimed as her own.

As far back as 1880 she began, with her husband's permission, to take boarders, and the profits arising from this source she has been permitted to retain as her own earnings. She was during all this time accustomed to do sewing, and the money thus made she added to her fund.

From the beginning, she was actuated by a very earnest desire to acquire a home of her own, and to this end she practiced the utmost frugality.

The fund thus accumulating was kept out at interest by her, and in her own name. To add to her savings and earnings, she did her own house-work, her cooking and her sewing. So frugal and industrious had she been, that at the time she bought the place now sought to be subjected to her husband's debts, her fund amounted to \$1,200. Mr. Franklin had no debts prior to 1886, and the rights of no creditor were affected by his assent to his wife's assertion of title to the fund thus accumulated. If this fund of \$1,200 be treated as the aggregate of the gifts of the husband to the wife within the sixteen years during which it was accumulated, then, as against the husband and his subsequent creditors, there is no difficulty in holding this \$1,200 to be the separate estate of the wife. A direct gift by the husband to the wife during coverture of money or other personalty, creates, by necessary implication,

a separate estate in the wife. *Powell v. Powell*, 9 Hum., 477; *Templeton v. Brown*, 86 Tenn., 50.

A very early and much cited case is that of *Slanning v. Style*, 3 P. Wms., 334. In that case the widow claimed to be paid out of her husband's estate £100. It appeared that whenever any person came to buy any fowls, pigs, etc., that the husband would say he had nothing to do with those things, which were his wife's, and that he had confessed that he had at one time borrowed from the fund in his wife's hands, arising from such sales of fowls and small produce, the sum of £100. To the claim it was insisted that the borrowing from the wife was only the husband borrowing his own money, and that there was no express agreement in writing whereby to raise a separate estate in the wife. But Lord Chancellor Talbot decreed that the widow was a creditor, observing "that the Courts of Equity have taken notice of and allowed *femes-covert* to have separate estates by their husbands' agreements; and this £100 being the wife's savings, and there being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail were it to determine by the husband's death."

An agreement that the gift of the husband to the wife shall be to her separate use, arises from the very necessity of the case, else the gift would be ineffectual. A gift to the wife of her own earnings, either from her labor, as for sewing, or

from the profits of her boarders, or of her savings from money furnished her for her own personal expenses, or her household expenses, may be made out by circumstances, and, when so made out, is as effectual as if proven by express contract. Especially does the implication of a gift to her sole and separate use arise where, as in this case, the wife, with the assent of the husband, loaned out such earnings and savings in her own name, or invested it in realty, taking title to herself. *McC Campbell v. McC Campbell*, 2 Lea, 663.

Shortly before the purchase of this property by Mrs. Franklin, her husband contracted a small indebtedness, a part of which seems to be yet unpaid. About this time he became a sufferer from rheumatism. Pain led him to the use of morphine, and within little more than a year after the purchase of this property he had become so much a victim of morphine and disease as to nearly destroy his capacity as a wage-earner. For something over a year after this investment he continued to contribute one-half of his wages toward the maintenance of his wife and her household expenses, but after that time his contributions as well as capacity to earn wages seem to have terminated. In the meantime he had a number of debts for borrowed money, which he spent in the gratification of his morphine habit, or in efforts to be cured, and in unfortunate speculations. Some of these debts are due to complainants. They were all made upon his individual credit, and not at all upon the faith

of this property, nor upon any connivance or consent of his wife. She continued to take boarders and to do sewing. The saving of house-rent doubtless accelerated her accumulations, and before this bill was filed she had, with aid of one hundred dollars borrowed by her from her brother, fully paid off the remainder of purchase-money.

It is now insisted that whatever may be her rights as to the \$1,200 accumulated before she bought this property, and while her husband was free from debt, that her savings and earnings after her husband became indebted are subject to the debts of her husband, and may be followed into the property in which she has invested them. Under the savage principles of the common law, the earnings of the wife belong absolutely to the husband. So, under the same stern code, the personal property of the wife at time of her marriage, or which comes to her by gift or descent during coverture, becomes the property of the husband. Equitable principles have, however, much tempered the harshness of these ancient rules. Thus, the wife's choses in action survive to her unless reduced to the husband's possession during coverture. The husband's assent to her retention of her choses is sufficient to establish her right to them as a separate estate.* Even creditors will not in equity be suffered to coerce the husband to an assertion of his right, when the wife asks a settlement, or such settlement seems just to the Chancellor, even though unsought. Even at the

Carpenter v. Franklin.

common law the creditor has no right or power to coerce the labor of his debtor. His paramount duty is to his family. Neither have creditors the right to compel their debtor to appropriate the earnings of his minor child. He may emancipate such child, and suffer it to reap the fruit of its own toil. So in *Leslie v. Joiner* it was held that a father may contract with his minor children that the produce of his minor children shall go to the support of the father's family, and the product of the labor of such children was held not subject to the creditors of the father. 2 Head, 513.

The right of the husband to the earnings of his wife, and the right of the creditor of such husband, stand upon no higher ground than does the right of the father to the earnings of his minor children. In either case the creditor has no right save through the husband or father; and if the father emancipate his minor child, or the husband assent to the wife's ownership of the fruit of her own toil, the creditor has no remedy.

"The wife's earnings," says Mr. Pomeroy, "may also, by the assent of her husband, be her separate property." Pomeroy's Equity, Sec. 1100.

The creditor, having no right to coerce the labor of the wife, is not affected by the assent of her husband that her earnings shall be her separate estate. No fund is thus diverted which was subject to his demand.

Mrs. Franklin, with the assent of her husband, continued to take boarders and to do sewing, and

with his assent her earnings from these sources were retained by her as her separate estate. The fact that he was indebted does not, in law or equity, affect the result. The earnings were the result of her own volition, the product of her own toil, and the fruit of her own self-denying frugality. The contributions of her husband after he became insolvent were necessarily of infinitesimal importance, and, from this proof, are unascertainable. *De minimis lex non curat.*

She says that of the purchase-price of this property, \$979 was her earnings from her boarders. In addition to this, she made an uncertain sum by sewing. If we add to these two sums the gifts of the husband to his wife before insolvency and while he was a steady workman, and the sum of \$100 borrowed by her, we can easily see that in the payment of the purchase-money of this property the gifts of the husband to the wife after she bought and after he became indebted, were of trifling importance.

The decree of the Chancellor will be reversed, and the bill dismissed with costs.

Patterson v. Patterson.

PATTERSON v. PATTERSON.

89 151
110 118

(Knoxville. September 26, 1890.)

1. BILL OF EXCEPTIONS. *Time of filing.*

Bill of exceptions may be signed, filed, and made part of record at any time before the close of the trial term, unless the Court has, by rule or order, prescribed a shorter limit.

Cases cited and approved: Jones v. Burch, 3 Lea, 747; Kennedy v. Kennedy, 16 Lea, 736; Mallon v. Manufacturing Company, 7 Lea, 62; Alexander v. State, 14 Lea, 88.

2. SAME. *Same. Rule not changed by Acts 1885, Ch. 65.*

And this rule is not changed by Acts 1885, Ch. 65, providing that all appeals to this Court shall be perfected by the giving of appeal bond or the taking of pauper oath within thirty days after rendition of the judgment or decree, if the lower Court should hold so long, otherwise before the adjournment of that Court. Bill of exceptions is not essential to perfect an appeal, and therefore not within said statute.

Act construed: Acts 1885, Ch. 65.

3. DIVORCE. *Evidence that does not support charge of adultery.*

The evidence set out in the opinion is insufficient to sustain the charge of adultery contained in the bill, and for which alone divorce is sought. It is not shown that the misconduct of defendant occurred *after* the marriage.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

Patterson v. Patterson.

D. D. ANDERSON, JAMES TAYLOR, and WAT M. COCKE for Complainant.

J. M. KING and OSBORNE & MILLER for Respondent.

CALDWELL, J. Complainant and defendant were married in Knoxville, on the twentieth of January, 1889, and, on the twenty-fifth of March following, this bill was filed by the wife for divorce and alimony. Answer and cross-bill were filed by the husband, and answer to the cross-bill by the wife.

The cause was heard by the Chancellor on the pleadings, proof on file, and testimony of witnesses examined in open Court, and decree was pronounced granting the wife divorce *a vinculo* and alimony.

The defendant has appealed, and here insists that the decree is not warranted by the evidence.

Complainant's counsel contend that the evidence is not before this Court, because the bill of exceptions, which contains the evidence, was signed by the Chancellor more than thirty days after the rendition of the decree.

This presents the first question for our consideration.

The final decree was entered June 16, 1890, and the appeal was prayed for, granted, and perfected by the execution of proper bond four days later.

Then, during the same term of the Court, on the twenty-third of July, 1890, the Chancellor

signed the bill of exceptions and made it a part of the record in the cause.

Under these facts, and the law applicable to them, can this Court regard the bill of exceptions as properly a part of the record?

The statute provides: "That hereafter when an appeal, or appeal in the nature of a writ of error, is prayed from a judgment or decree of an inferior Court to the Supreme Court, the appeal shall be prayed for, and appeal bond shall be executed or the pauper oath taken, within thirty days from the judgment or decree, if the Court holds so long, otherwise before the adjournment of the Court; but for satisfactory reasons shown by affidavit, or otherwise, and upon application made within the thirty days, the Court may extend the time to give bond or take the oath in term or after adjournment of the Court; but in no case more than thirty days additional." Acts 1885, Ch. 65, Sec. 1.

This language relates alone to the prayer for, and perfection of, an appeal, or appeal in the nature of a writ of error. By its terms and by proper construction it embraces no other subject. A bill of exceptions is in no sense a part of an appeal, or an appeal in the nature of a writ of error. The one may exist in any case without the other. A bill of exceptions may properly be made out, signed, and filed as a part of the record without an appeal or an appeal in the nature of a writ of error; and so an appeal, or appeal in

Patterson v. Patterson.

the nature of a writ of error, may be properly perfected and prosecuted without a bill of exceptions.

It is *the appeal*, or *appeal in the nature of a writ of error*, and not *the bill of exceptions*, that, by the letter and spirit of the Act, must be perfected within thirty days from the rendition of the decree or judgment, or within additional time allowed by the Court on application.

The bill of exceptions may be signed and made a part of the record at any time before the close of the term. 3 Lea, 747; 16 Lea, 736; 1 Milliken's Meigs' Digest, Sec. 367, p. 333.

Such has been the uniform rule of practice in this State. It is not changed by the Act in question.

The trial Judge may make a rule establishing a reasonable period, though not covering the whole term, within which bills of exceptions shall be presented for approval and signature. *Mallon v. The Tucker Manufacturing Co.*, 7 Lea, 62; *Alexander v. The State*, 14 Lea, 88.

No rule of this character had been adopted by the Chancellor who tried this cause, hence the general rule is applicable; and the bill of exceptions found in the transcript is properly a part of the record, and before this Court for consideration.

Mrs. Patterson's bill contains many grave charges against her husband; but the only allegation sufficiently definite and certain to authorize a decree

for divorce is that one wherein she charges that since their marriage he has "been guilty of criminal intercourse or adultery in Knoxville, Tennessee, with one Sis Julian, a public prostitute, residing at 208 Crozier Street," etc.

Though that fact is not recited, we infer that the Chancellor based his decree on this allegation and proof made to support it.

The only evidence touching this charge is that given by "Jo Hull," who testified as follows:

"I knew defendant a short time before he married Annie Bowers, and have known him since then. I never saw him with Sis Julian. I don't know Sis Julian. He told me he was keeping a woman named Sis Julian, at 208 Crozier Street. He asked me to go there with him, but I declined. I saw him go into the house; it is a house of ill fame."

This evidence falls far short of establishing the truth of the charge. It is not stated by the witness, nor otherwise made to appear, whether the conversation mentioned or the visit to the disreputable house was *before* or *after* the marriage between complainant and defendant. That matter, though most material, is left in doubt. The Court cannot infer or presume that the offense was subsequent to the marriage, as it is alleged in the bill to have been. It may have been before and it may have been after the marriage. If before, it affords no ground of relief in this cause; if after, the burden was on complainant to show it.

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Having failed to make out her case, she must fail in the relief sought.

That both parties have had bad associations, and been surrounded by corrupt and corrupting influences for some time is, unfortunately, a well-established fact; but that either has been guilty of such wrong or wrongs against the other as to authorize a dissolution of the bonds of matrimony subsisting between them is not satisfactorily shown.

Reverse the decree, and dismiss the bill at the cost of complainant.

Tuttle v. Knox County.

TUTTLE v. KNOX COUNTY.

(Knoxville. September 27, 1890.)

1. PUBLIC ROADS. *Road law of 1889 unconstitutional.*

The "road law" of 1889 is unconstitutional to the extent that it provides for the taking of private property for public use in opening and changing the public highways. The fatal defect of this statute is its failure to designate by whom the land-owner's damages shall be paid, and to provide an effectual remedy to enforce payment thereof.

Constitution construed: Art. I., Secs. 8, 21.

Acts construed: Acts 1889, Ch. 71, Sec. 8.

2. SAME. *Same.*

That Act violates Art. I., Sec. 8, of the Constitution, which ordains "that no man shall be deprived of his property, but by the judgment of his peers or the law of the land."

3. SAME. *Same.*

And violates also Art. I., Sec. 21, of the Constitution, which provides that "no man's property shall be taken or applied to public use without the consent of his representatives, or without just compensation being made therefor."

4. SAME. *Proceedings under Act of 1889 cannot be maintained under pre-existing law.*

Proceedings to open public road, had in conformity to Act of 1889, cannot be maintained under pre-existing laws, because (1) they are not in substantial conformity to the pre-existing law, and (2) the pre-existing law is expressly repealed by the Act of 1889.

Acts construed: Acts 1889, Ch. 71; Acts 1885, Ch. 2.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. CHARLES NELSON, Sp. J.

Tuttle v. Knox County.

WAT M. COCKE and ANDREWS, THORNBURGH & SANFORD for Land-owners.

TAYLOR & HOOD and INGERSOLL & PEYTON for Petitioners.

TURNER, Ch. J. Under the Act of March 25, 1889, Section 8, page 100, certain citizens of Knox County petitioned the County Court to lay out a public road in the Twelfth District. Petitioners obtained relief in the lower Court. Tuttle appealed.

Section 8 of said Act is as follows: "That all applications to open, change, or close a public road shall be made to the County Court, which shall have power to appoint a jury of view, consisting of not less than three nor more than five men, provided five days' notice shall be given to all land-owners, or parties controlling lands which are touched by said roads proposed to be located, changed, or closed, which jury may employ a surveyor or a civil engineer; and said jury shall have the power of condemnation and to assess damages, and parties aggrieved may appeal to the County Court; *And provided further*, That seven Justices may constitute a quorum to try all appeals in road cases."

The Act nowhere provides for the payment of damages to the land-owner, and of course gives him no remedy to secure them.

By Article I., Section 8, of the Constitution, it

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is ordained "that no man shall be deprived of his property, but by the judgment of his peers or the law of the land."

By Section 21 "no man's property shall be taken or applied to public use without the consent of his representatives or without just compensation being made therefor."

The Act before us is violative of these provisions of the Constitution in that it nowhere provides a means of collecting damages, or just compensation for property proposed to be taken for public use, nor by whom such compensation shall be paid.

While the Act provides that the jury of view may assess the damages, it contains no authority to assess them against any individual, corporation, or municipality. It leaves to speculation who is to be responsible, the public or the individuals who ask for the road; and there is no authority to any Court to render a judgment.

If the law were enforced, it would result in assessment of damages without more, and upon such assessment the owner would be deprived of his property for public use, and receive no compensation therefor.

The purposes of the Constitution are to place the citizen in a position to demand and receive compensation; that the enabling statutes shall point out the persons who shall pay the compensation, and at the same time furnish the remedy for the enforcement of that payment. None of these

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things are done by the eighth section of the Act, and it is therefore unconstitutional and void.

As the Act of April 9, 1885, provides for proceedings different in every essential matter, with a different organization to carry them out, the present application to the County Court cannot, by construction, be referred to and determined by it.

An additional reason why we cannot refer proceedings under the Act of 1889 to that of 1885, or any other statute, is that the Act of 1889 is entitled "An Act to regulate the laying out and working of public roads and compile the road law, and to include all laws on this subject in one Act;" and Section 33 enacts "that all Acts passed heretofore providing for the working and laying out of public roads, except such as are incorporated in this Act, be, and the same are hereby, repealed, it being the intention of this Act to compile all laws on the subject of laying out and working public roads, and to include them in this Act," etc.—a repeal, in terms, of all laws on the subject.

Reverse the judgment and dismiss the proceedings at the cost of petitioners.

McDonald v. State.

McDONALD v. STATE.

(Knoxville. September 27, 1890.)

1. SELF-DEFENSE. *Erroneous charge.*

Court's charge upon the subject of self-defense is erroneous in which the phrases "great or enormous bodily harm," and "great and enormous bodily harm," are used instead of the oft-repeated and well-settled language—"great bodily harm." "Enormous" is not synonymous with "great," but is a word of stronger import.

2. COURTS. *Their duty with reference to charging the law.*

Courts should not, in charging juries, depart from the long-settled, oft-repeated, and well-understood language in which the Court of last resort has declared the law.

3. SAME. *Their rights and duty with reference to asking witnesses questions.*

While the Court may, with propriety, propound questions to a witness, even in a criminal case, yet he should rarely do so, and never in such manner as to indicate to the jury his opinion of the merits of the case.

FROM KNOX.

Appeal in error from the Criminal Court of
Knox County. S. T. LOGAN, J.

TAYLOR & HOOD and S. G. HEISKELL for McDonald.

Attorney-general PICKLE for State.

McDonald v. State.

TURNEY, Ch. J. Plaintiff in error was convicted of involuntary manslaughter, and sentenced to four years in the penitentiary.

In his charge to the jury the Court said:

"In order to justify the defendant under his plea as before stated, there must be some words or overt act at the time clearly indicating a present purpose on the part of Price to take defendant's life, or do him great or enormous bodily harm," and added:

"Did the act or demonstration of Price toward defendant clearly indicate a purpose, at the time of the stroke, to take his life or do him great and enormous bodily injury?"

These passages are assigned as error, and we think properly. On this subject the law in Tennessee, evidenced by a long line of decisions is:

"That if at the time of the killing the defendant was in danger of death or great bodily harm, or honestly believed, upon reasonable grounds, that he was in such danger, then the killing would not be murder or manslaughter, but would be self-defense."

It is insisted by the Attorney-general that the phrase "great or enormous bodily harm is not erroneous;" that "the words are synonymous, or nearly so." To be nearly synonymous is not sufficient. To satisfy the law there must be complete synonymy. Especially must this be so after the use of "great" in our Courts for a period of sixty years without addition or qualification. To

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say that the words are nearly synonymous is to admit a difference in their grades of meaning. We must also look to the meaning as commonly understood by the community, and as naturally interpreted by juries. By this rule, it is readily seen, the word "enormous" has more intensity and a deeper color of expression than the word "great."

Courts and juries are accustomed to the one and not to the other in the investigation of homicides. Their education must be regarded. Without the word "enormous" the charge on this particular subject would have been perfect; with the addition of "enormous" the Court must be understood to have meant something more than "great," or as explaining to the jury what he would have it to understand he meant by the use of that word. If synonymous, there was no occasion for the tautology, and its use was calculated to mislead. The fact that at one time the Court says "great or enormous," and at another, in the same connection, "great and enormous," does not relieve the error, as the qualifying sense still remains, and "enormous" defines "great."

Of course, as said in the case of Selfridge, "a man who, in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or do some enormous bodily harm, may lawfully kill the assailant," etc.

There can be no doubt of the soundness of this law as charged in Massachusetts in 1806, but it

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does not follow that the accused in that case was not entitled to the milder rule of "great bodily harm." He did not need it, however, as the jury acquitted him, and he had no occasion to ask a review of the charge.

When the path is plain and well marked by long and consistent travel, it is always safe to pursue it, while it is always dangerous to undertake to make a new one to the same end, or to qualify old, unbroken, and well-understood expressions of what the law is.

The accused said, as a witness, that deceased drew his hand from his pocket, and that he (witness) thought he had a weapon.

The Court asked: "Did you find any weapon in his hand or about him?" Witness said he did not. This is urged as error. We will only say that while the Court may, as a matter of right and duty, call on a witness to repeat or explain what he may have said on any subject of inquiry, he should do so with care and caution, and in a way not to indicate to the jury any impression of the weight or importance his mind attaches to the testimony inquired about. It is natural that jurors should be anxious to know the mind of the Court and follow it; therefore a Court cannot be too cautious in his inquiries.

As a rule Courts are to try cases as made by parties or attorneys, and not make the effort to supply what may seem to them as missing links in the chain of testimony; to do so would be

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error. In this instance we do not hold the action of the Court was error, nor is it necessary to do so in view of our holding on the first question.

For the error indicated the judgment is reversed and the cause remanded.

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BLEIDORN v. PILOT MOUNTAIN C. & M. COMPANY.

(Knoxville. September 30, 1890.)

1. WILL, FOREIGN. *Passes land within this State, when.*

Foreign will operates, without recording or registration in this State, to pass any land here situated when such will has been executed and attested in the manner prescribed by our statutes, and duly proved and recorded in another State, the testator's domicile, under statutes identical with our own. (*Post*, pp. 172, 173.)

Code construed: § 3022 *et seq.* (M. & V.); § 2182 *et seq.* (T. & S.).

Case cited and approved: *Smith v. Neilson*, 13 Lea, 461.

2. SAME. *Effect of proving and recording in this State.*

Foreign will, upon being proved and recorded in this State, passes title to land here situated as of date of testator's death. Therefore the devisee may have such will proved and recorded after bringing suit for the land, and introduce it to support his title. (*Post*, pp. 173, 174.)

(See Code, § 3035 (M. & V.); § 2195 (T. & S.).

Cases cited and approved: *Crockett v. Campbell*, 2 Hum., 411; *Brien v. O'Shaughnessy*, 3 Lea, 725; *Ward v. Daniel*, 10 Hum., 607.

3. RES ADJUDICATA. *Decree for removal of cloud against unknown party upon publication. Jurisdiction.*

Decree for removal of cloud from title is void, and therefore not available as *res adjudicata* in a subsequent suit over the same land, between the same parties or their privies, where it is pronounced against "unknown" parties upon publication alone, which does not conform in material respects to the requirements of our statutes on that subject. The *Court's jurisdiction* depends, in such case, upon *strict compliance* with these statutes. (*Post*, pp. 176-180.)

Code construed: §§ 5095, 5096, 5101 (M. & V.); §§ 4352, 4353, 4358 (T. & S.).

Case cited and approved: *Ferris v. Lewis*, 2 Tenn. Ch., 291-295.

Cited and distinguished: 110 U. S., 151.

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4. SAME. *Same. Who are unknown parties.*

Defendants to bill who are not otherwise described therein than as "the heirs of L. Bleidorn," must be proceeded against as "unknown" parties. They are not named in the bill. (*Post*, p. 178.)

5. SAME. *Same. Publication for unknown party unauthorized, when.*

Publication for "unknown" defendants, based solely upon the averment supported by affidavit that they are *non-residents* of the State, is unauthorized and void, and confers no jurisdiction upon the Court over such parties. (*Post*, pp. 178, 179.)

6. SAME. *Same. What is essential to Court's jurisdiction over unknown defendants?*

It is essential to the Court's jurisdiction over "unknown" defendants, whether resident or non-resident, that publication for them should be based upon a sworn statement of the complainant, his agent or attorney, made in his bill or by separate affidavit, that their names are unknown, and "cannot be ascertained upon diligent inquiry." (*Post*, pp. 178, 179.)

7. STATUTE OF LIMITATIONS. *Seven years' adverse possession will not bar remainder-man's suit for land, when.*

Seven years' adverse possession of land, begun pending a life estate therein, does not bar the remainder-man's suit for the land brought within the saving of the statute (three years) after the falling in of the life estate.* (*Post*, p. 174.)

(See Code, § 3451 (M. & V.); § 2757 (T. & S.).

8. SAME. *Seven years' adverse possession bars remainder-man's suit for land, when.*

Seven years' adverse possession of land commenced before the inception of a life estate therein, and continued afterwards to make out the required period of seven years, bars the remainder-man's suit for the land brought at any time thereafter. (*Post*, pp. 180, 197.)

9. SAME. *Extent and effect of adverse possession.*

Adverse possession of land, held under color of title, extends to the boundaries therein described; but naked adverse possession is con-

* As the remainder-man is not "entitled to commence an action" until the termination of the life estate, it would seem the statute would not begin to run against him until that date, and therefore he could sue at any time within *seven years* thereafter.

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fined to its actual, visible limits. When a small naked possession becomes part of a larger tract, claimed by the possessor or his privies under color of title, the extension of boundaries and possession occur at the same instant. There is no relation of the extended to the date of the original possession.* (*Post*, pp. 183, 184, 197.)

10. CHAMPERTY. *Non-resident owner's sale of land adversely holden under decree or grant, void.*

Non-resident owner's "sale and conveyance" of lands situate in this State is champertous and void where they were, at date of sale, adversely holden under a *decree vesting title* or a *grant*. Lands thus holden are in "adverse possession by deed, devise, or inheritance" within meaning of our champerty laws. (*Post*, pp. 194, 195.)

Code construed: § 2448 (M. & V.); § 1779 (T. & S.).

Case cited and approved: *Whiteside v. Martin*, 7 Yer., 384.

11. SAME. *Bona fides that rebuts illegality of sale.*

The provision of our champerty laws that sales of lands held adversely shall be presumed champertous "until the purchaser shows such sale was *bona fide* made," is not satisfied by proof that the sale was in good faith as between the parties, but there must be proof that it was *bona fide* with reference to the provisions and policy of the champerty laws. (*Post*, pp. 195, 196.)

Code construed: § 2449 (M. & V.); § 1780 (T. & S.).

Case cited and approved: *Gass v. Malony*, 1 Hum., 452.

12. OUTSTANDING TITLE. *Defense of, available without special plea.*

Defense of outstanding title is available in action of ejectment without special plea. (*Post*, p. 188.)

(See Code, § 3963 (M. & V.); § 3239 (T. & S.); and *Walker v. Fox*, 85 Tenn., 155.)

13. SUPREME COURT PRACTICE. *Paper copied into transcript treated as part of record, when.*

A paper (an entry) copied into transcript will be treated as part of the record, though imperfectly certified, where there is no exception to

*A held adverse possession of one acre for three years. He then took deed for ten acres including the one. He continued his possession within the one acre for four years more. This invested him with a possessory right for that acre, and to that extent his possession ceased to be wrongful. Did the possession on that acre thereafter operate as to the nine acres?—REPORTER.



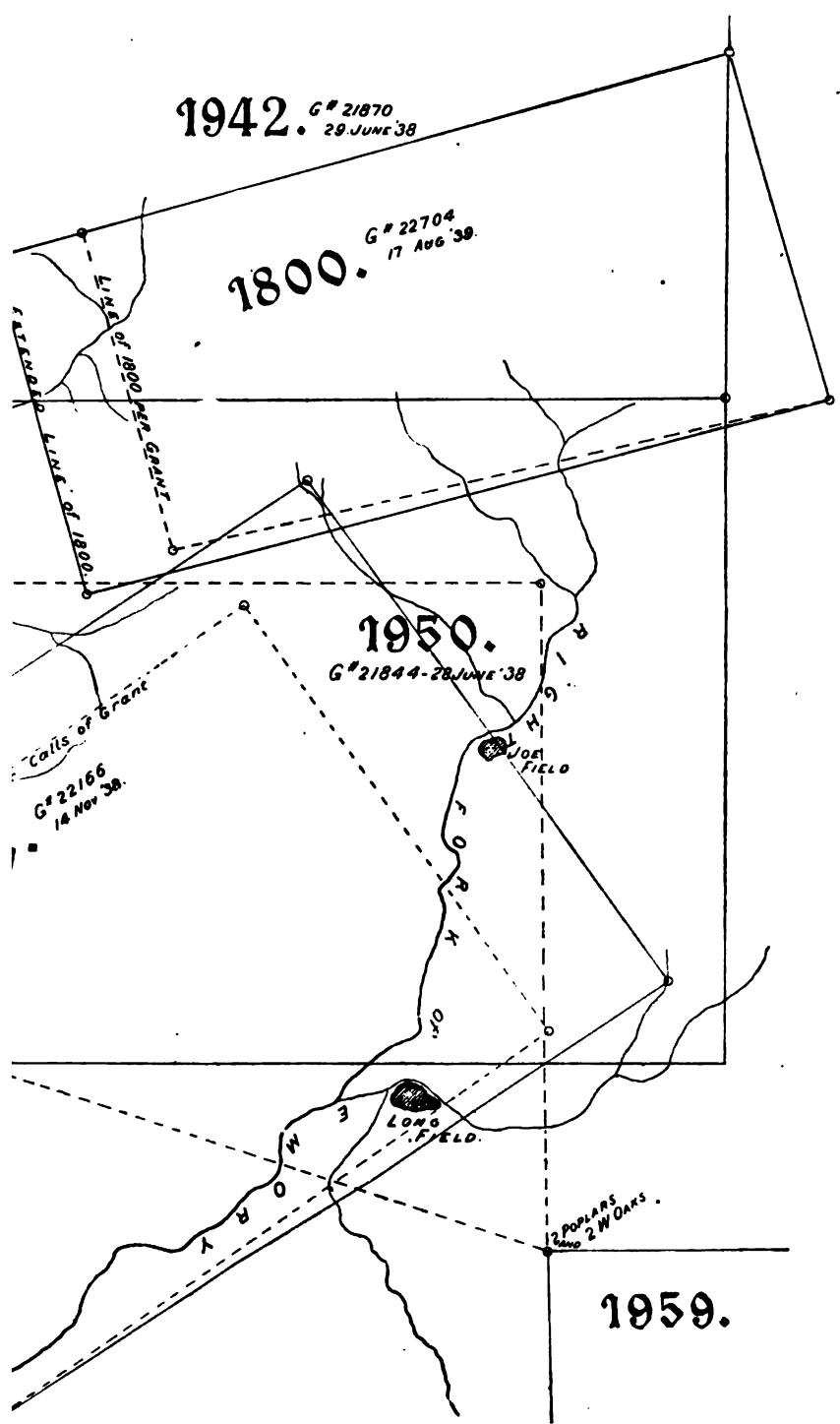
1942. G# 21870
29 JUNE '38

1800. G# 22704
17 AUG '39

1950. G# 21844-28 JUNE '38

Calis of Grant
G# 22166
14 Nov '38

1959.



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its admission as evidence below, and no assignment of error upon it in this Court. (*Post*, p. 189.)

(See *Graham v. McReynolds*, 88 Tenn., 241.)

14. LAND LAW. *Priority of grant.*

Senior grant based upon junior entry prevails over junior grant based upon senior entry unless the latter entry is put in evidence and shown to be special. (*Post*, p. 175.)

15. SAME. *Example of special entry.*

Entry: "J. F. Scott enters 200 acres of land in said county [Morgan] on the waters of Rock Creek, beginning on the line of Russell Scott's land, on the south side of said land, and then running an oblong with the Carpenter road so as to include said road." This entry may be made special by proof of the existence, location, and notoriety of the objects called for. (*Post*, p. 187.)

16. SAME. *Same.*

And it is sufficient for this purpose to show that "Russell Scott's land" was an old settlement well known in that community, and that the "Carpenter road" was an old and well-known road of that vicinity. This entry would then be located by bounding it on the north by Russell Scott's land and laying it off in an oblong including the Carpenter road.

17. SAME. *Another example of a special entry.*

Entry: "H. M. Byrd enters 5,000 acres of land in said county, beginning on a stake at or near the east corner of J. F. Scott's 200-acre entry on the Carpenter road, thence running south 1,200 poles; thence east 1,500 poles; thence for complement to the beginning, so as to include the head-waters of Scutcheon." This entry is special upon the proof of existence, location, and notoriety of the objects called for. (*Post*, pp. 186-189.)

18. SAME. *Same. Locative calls.*

This Byrd entry contains three locative calls: (1) The 200-acre Scott entry, (2) the Carpenter road, (3) to include the head-waters of Scutcheon. The proof shows that the 200-acre Scott entry is special, though unsurveyed, and that to begin the survey of the Byrd entry on its north-east corner would include the head-waters of Scutcheon,

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but that to begin on the south-east corner would include only part of the head-waters of Scutcheon. (*Post*, pp. 186-189.)

Cases cited and approved: Wallen v. Campbell, 2 Overton, 320; Talbot v. McGavock, 1 Yer., 271; Berry v. Wagner, 5 Lea, 564.

Cited and distinguished: Parrish v. Cummins, 11 Hum., 299; Fowler v. Nixon, 7 Heis., 719.

19. SAME. *Example of an indifferent entry.*

Entry: "Thos. Scott enters 150 acres of land in said county (Morgan) on the waters of Emory river, adjoining the survey made in the name of Jacob Laymence, under the foot of the mountain, and running around under the foot of the mountain, joining the new ground." This entry was capable of being made special by proof of the existence, location, and notoriety of the natural and artificial objects called for. In the absence of such proof it is not a special entry. (*Post*, pp. 201, 202.)

Cases cited and approved: Wood v. Ellege, 11 Heis., 607; Barnes v. Sellers, 2 Sneed, 33; Brummett v. Scott, 4 Heis., 321.

20. SAME. *Example of another indifferent entry.*

Entry: "Samuel Scott, Sr., enters 5,000 acres of land in said Morgan County, on both sides of Emory River, beginning on the east corner of Thomas Scott's 150-acre entry, on the east side of Emory, and then running up Emory on both sides for complement, to include the complement after plotting out all prior legal rights." This entry is not special on its face. There being no proof of the existence and notoriety of the natural and artificial objects called for, other than copy of the 150-acre entry, it is not special at all. (*Post*, pp. 200-203.)

Case cited and approved: Scott v. Lewallen (oral opinion at Knoxville in 1888).

21. SAME. *Lines should be surveyed by horizontal measure.*

Calls for distance should be surveyed, in the absence of other controlling calls, by horizontal, not by surface, measurement. (*Post*, p. 185.)

22. SAME. *Course and distance control, when.*

Calls for course and distance, without more, control in the running and establishment of lines and corners which have not been previously run and marked. (*Post*, pp. 183, 198, 200.)

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23. SAME. *Senior enterer or grantee cannot extend his lines to prejudice of junior claimant, when.*

Senior enterer or grantee, whose lines call for course and distance without more, cannot, by *ex parte* survey, made after the junior claimant's rights have attached, extend his boundaries beyond the legitimate calls of his entry or grant to the prejudice of such junior claimants. It might be different if the State alone were interested in the lands included by the extension. (*Post*, pp. 197-200, 203.)

Cases cited and approved: Chouning v. Simmons, 5 Hum., 299; Woodfolk v. Cornwell, 1 Head, 273; Nolen v. Wilson, 5 Sneed, 333; Fly v. E. T. College, 2 Sneed, 689.

Cited and distinguished: Whiteside v. Singleton, Meigs, 207; Overton's Heirs v. Cannon, 2 Hum., 264; Williamson v. Buchanan, 2 Overton, 278; Caruthers v. Crockett, 7 Lea, 91.

24. SAME. *Location of entry 1727.*

The eastern boundary of entry 1727 is located, upon the proof, as shown by dotted line upon the map. (*Post*, p. 181. *See map*.)

25. SAME. *Location of entry 1950.*

Entry 1950 is located upon the evidence as shown by the dotted lines upon the map, making the "two large poplars and two large white oaks" its south-eastern and controlling corner. (*Post*, pp. 190-195. *See map*.)

FROM MORGAN.

Appeal from Chancery Court of Morgan County.
H. R. GIBSON, Ch.

S. N. VANCE, W. R. TURNER, and G. W. PICKLE for Bleidorns.

L. A. GRATZ, HENDERSON & JOUROLMON, D. K. YOUNG, SAM EPPS YOUNG, J. H. LEWALLEN for Respondents.

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LURTON, J. This is a bill of ejectment. The lands involved embrace some fifteen thousand acres, lying on the Cumberland Mountains, in Morgan County.

Complainants claim title under the will of Louis Bleidorn. This will was executed in April, 1852. Under it this body of wild mountain land was devised to Mrs. Bleidorn for life, with remainder, at her death, to complainants. Mrs. Bleidorn died November 7, 1882, and this bill was filed within three years thereafter. Much of the land is adversely held, and as to this the plea of the statute of limitations is relied upon. If this will was effective to create a life estate in Mrs. Bleidorn, then no possession which began during the existence of this life estate will operate to bar the suit of complainants, their suit having been filed within three years after the termination of the life estate. The testator, Louis Bleidorn, resided, at the time of his death, in the city of New York. Its execution and attestation occurred in the State of New York, and in all these respects it was executed in strict accordance with the statutes of this State concerning wills of realty. It was duly proven and admitted to probate in New York, and this probate was in accord with our statute. The objection urged by defendants is that it was never admitted to probate in this State until 1887, some years after the institution of this action. Defendants strenuously insist that a will conveying lands in this State is a nullity as a

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conveyance of such land until recorded in this State, and that it operates as a conveyance only from the date of such registration. The question as to whether a will, duly probated in another State, and executed according to the law of this State, is operative as a conveyance of lands in this State without registration here, was most elaborately considered and answered in the affirmative by this Court in the case of *Smith v. Neilson*, reported in 13 Lea, 461.

This conclusion was reached as the proper construction of our statute of wills, and has been adhered to in more than one unreported case. The question is one which affects the titles to large bodies of land in this State; and a doubtful statute having been construed, after full argument and laborious consideration, the result then announced will be adhered to, however we might be disposed to regard it if an original question.

But upon another ground this defense would prove unavailing. Pending this litigation this will was duly proven and recorded in this State, and a copy of the record admitted as evidence without objection. The effect of this registration was to confirm and perfect the title of complainants, and this confirmation relates to the date of the execution of the will. It was not the acquirement of a new title after suit brought, but the confirmation of a defective title. The effect of the recording of the will was not to confer a title as of the date of the registration or probate, but to

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vest and confirm title as of the date of the testator's death.

In *Crockett v. Campbell*, 2 Hum., 411, it was held that a deed executed after commencement of suit, confirming one defectively made before suit, was admissible, and operated to confirm the defective execution of a power of attorney.

So a tax-deed made after suit brought was held admissible in evidence in an ejectment suit, it being operative to confirm a deed theretofore made, but defective in its recitals. *Brien v. O'Shaughnessy*, 3 Lea, 725; see also *Ward v. Daniel*, 10 Hum., 607.

It follows that the will of Louis Bleidorn operated to create a life estate in his widow, and, as a result, no adverse possession which began after the death of the testator in April, 1852, will operate to bar complainants as remainder-men suing within the period allowed by the statute for such suit after the falling in of the life estate.

The title of complainants originated in three entries for about 5,000 acres each. These entries were made February 17, 1836. Grants issued upon all these entries to Thos. B. Eastland in June, 1838. These entries were numbered respectively, 1942, 1949, and 1950.

The contest over entry 1949 is chiefly with the Pilot Mountain Coal and Mining Company, who claim title under various grants to the larger part of the land covered by it. The entries and grants under which this corporation claims, or which are

relied upon as outstanding titles, superior to that of complainants are as follows:

First.—Entry No. 1727, grant No. 22339, to Julian F. Scott, for 5,000 acres.

Second.—Entry No. 1925, grant 22329, to H. M. Byrd, for 5,000 acres.

Third.—Entry 2683, grant 27076, to David Mc-Peters, for 600 acres.

Fourth.—Entry 2244, grant 23171, to J. F. and R. Scott, for 500 acres.

Fifth.—Entry 1495, grant 22166, to Samuel Scott, for 5,000 acres.

None of these entries or grants cover the whole of complainants' entry 1949, and some of them lap upon each other.

First.—As to the conflict between entry 1727 and entry 1949. Entry 1727, as indicated by its number, is an older entry than 1949, but the grant upon the latter issued first, and unless 1727 was a special entry, then the older grant upon a younger entry is the better title. Entry No. 1727 is not in evidence. It is copied into the transcript, but counsel have signed an agreement that it was not read in evidence below. For this reason we cannot now look to it. It therefore not appearing that the senior entry was a special entry, the senior grant, though founded upon a junior entry, must be held the superior title.

To avoid this result, the defendant, the Pilot Mountain Coal and Mining Company, plead and rely upon a decree of the Chancery Court of Morgan

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County, adjudging that entry 1727 was a title superior to that of complainants'. It is insisted that complainants were parties, and therefore concluded by this adjudication, and it is relied upon as *res adjudicata*.

To understand the effect of this plea, it is necessary that the facts concerning it be stated. The title of the Pilot Mountain Co. to much of the land claimed by it within the bounds of entry 1949, is by deed from one G. A. Fudickar. Fudickar, by a chain of conveyances, became the owner of entry 1727, which, as before stated, laps upon 1949, and covers perhaps one-half of the land within the younger entry.

While thus the owner of this title, Fudickar, on March 7, 1877, filed an original bill in the Chancery Court of Morgan County, charging that he was the owner in fee of a tract of 5,000 acres, same having been entered by entry 1727; that this entry conflicted with certain entries subsequently made, and that upon these junior entries grants had been issued to Thos. B. Eastland. He charged entry 1727 to have been a special entry, and that he had been in possession, under his title, for more than twenty years, and that the persons claiming title under the Eastland grants had never been in possession. He prayed that his title be decreed the superior title to the extent that it conflicted with the Eastland grants, and that the interfering titles be canceled as clouds upon his own superior title

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This bill was filed against F. Clapp, S. S. Davis, and a number of others. Among those sought to be made defendants, and named in the caption as such, were a class of persons not designated by name, but described as "the heirs of L. Bleidorn." All of the defendants were stated to be non-residents of the State, and publication for them as non-residents prayed. Publication was made as prayed, and, none of the defendants appearing or defending, a decree *pro confesso* was entered; and this was followed by a final decree in accordance with the prayer of the bill.

By this decree entry 1727 and the grant thereon was adjudicated superior to any title claimed by defendants, and their titles canceled as clouds, and all of defendants were enjoined from setting up or asserting any which conflicted with that set out as owned by Fudickar. L. Bleidorn was dead at the date of this suit, and complainants were his heirs at law, though they take this land as devisees and not as heirs. If they were parties to this bill of Fudickar's, it may be assumed that in the Courts of this State they would be concluded by the decree therein rendered, although such a decree against non-residents—parties only by publication, and who entered no appearance—would be treated by the Courts of the United States and of other States as a nullity. *Hart v. Samson*, 110 U. S., 151, and cases cited.

When such a proceeding is expressly authorized by statute, a decree against a non-resident—a

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party only by publication—is, from the necessity of the case, and by force of the statute, valid and conclusive within the jurisdiction authorizing such publication. Inasmuch, however, as the jurisdiction is dependent wholly upon statute, the compliance with the statute must clearly appear. If, therefore, the heirs of L. Bleidorn had been *named* in the caption as defendants, and publication been made for them by their proper names, such publication would have operated to make them parties as non-resident defendants. But they were not named either in the bill or in the publication. The only allusion to them in the bill is found in the caption, where they are sought to be made defendants by description as “heirs of L. Bleidorn.”

By § 4352, subsection 5, personal service is dispensed with and publication authorized “when the name of the defendant is unknown, and cannot be ascertained upon diligent inquiry.”

By § 4353 it is provided that “to dispense with process in either of the above cases the facts shall be stated under oath in the bill, or by separate affidavit, or appear by return.” This bill was sworn to, and contained the statement that all of the defendants were non-residents. This was enough to authorize publication for *named* non-resident defendants. The bill, however, contained no statement that the heirs of L. Bleidorn were unknown, “and cannot be ascertained by diligent inquiry.” Neither was this fact stated in any separate affidavit, nor did it appear in the

publication, nor by any recital in any decree or order of the Master authorizing publication. There was no authority to make publication by description for the "heirs of L. Bleidorn," unless the fact appeared in the bill, or by separate affidavit that their names were unknown and could not be ascertained upon diligent inquiry. The order of publication, where the name of the defendant is unknown, should not only describe the defendant by character, but should further do so by reference to his title or interest in the subject-matter of the litigation. Code, § 4358.

The plainest instincts of natural justice require that parties proceeded against in Courts of Equity or Law shall have an opportunity to be heard. Personal service of process can be dispensed with only in the few cases embraced by the statute, and when a decree is relied upon as concluding the rights of litigants who were not personally served, and who made no appearance, it must clearly appear that the statute has been complied with. *Ferriss v. Lewis*, 2 Tenn. Ch., 291-295.

The fact that the name of a defendant is unknown, and the further fact that the name could not be ascertained, are essential jurisdictional facts. These facts not appearing either in the bill or separate affidavit, nor being recited as facts in any decree authorizing publication, or otherwise in the record, the decree relied upon as *res adjudicata* was a nullity as to complainants. The second assignment of error is therefore sustained.

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Second.—Has the statute of limitations barred a recovery of the land covered by entry 1727?

First, the possession of Levi Scarborough will be considered. In considering questions of boundary and possession, the map made by J. W. Scott, and filed as an exhibit to his deposition, will be the one referred to in this opinion. This map shows three separate possessions, designated as Scarborough possessions Nos. 1, 2, and 3.

The possession marked No. 1 is clearly south of entry 1727, though inside entry 1949. In considering defendants possession of 1727 this possession No. 1 will not be considered.

The possession designated No. 3, though inside 1727, is a late possession. Scott fixes it at not more than twelve or thirteen years old. This is not contradicted by any material or direct evidence in the record. This possession, having begun during the existence of the life estate, does not affect the suit of complainants as remainder-men.

Possession No. 2 was begun by the weight of proof in 1846 or 1847, and by the preponderance of the evidence was continued for something more than seven years. This possession was under Julian F. Scott, the grantee under entry 1727. Scott sold the land within his entry, January 8, 1853, to one J. S. Duncan. It has been much pressed in argument that Scarborough had abandoned his possession before this sale to Duncan. The evidence relied upon to show this is that of the witness E. R. Duncan. This witness states

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that he surveyed this entry, 1727, in 1854, but does not state whether Scarborough was then in possession or not. In another connection he states that he "heard J. F. Scott, in a conversation with J. S. Duncan about this land, say that Scarborough had not treated him right; that he had kept him on that tract of land, and had fed him, and that he had 'went' off and left the land." Now, if this admission of Scott's was made before his sale to Duncan, or at the time of sale, then a possession begun in 1846 or 1847 (the witness fixing the origin of the possession as either in the one or the other) would not have continued seven years if terminated before January 8, 1853. But the witness does not fix the date of the conversation he heard. It was probably while making the survey in 1854, and, if so, it would not at all follow that the possession had been abandoned within seven years. The evidence of the witnesses Jessie Freels, Wiley England, E. J. Garrett, and Russell Scott seems to establish that the occupancy of Scarborough continued for about eight years, terminating in 1854 or 1855.

A more serious question arises upon the contention of complainants that this possession No. 2 was not inside the lines of 1727 when properly surveyed, and that therefore it was not held under color of title, and is now inoperative to defeat a recovery by complainants of the lands covered by 1727. Whether inside or outside depends upon the correct survey of defendants' title-papers. The

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grant upon entry 1727 is numbered 22339, and issued December 25, 1838, being junior in date to complainants' grant upon their entry 1949. It was a grant for 5,000 acres, and is bounded as follows:

"Beginning at a white oak, the fork of the Carpenter road and R. Davis' path; thence east 894 poles to a stake; thence south 1,000 poles to a stake; thence 894 poles to a stake and pointers; thence a direct line to beginning."

The complainants' witness, J. W. Scott, who seems a most intelligent and candid witness, and a thoroughly competent surveyor, says that "in running according to grant I found no marked line at point where poles give out at end of first call of 894 poles east from beginning." "I found a marked line, apparently about twelve years old, running north and south at a distance of about 10 poles east of the line I run." Again he says: "The east line of 1727 runs west of the Scarborough possession No. 2 thirty-four poles, if the entry be run by the grant." If it be run by the deeds under which defendants hold, then he says the eastern line runs through possession No. 2, throwing about one acre inside the deeds under which the Pilot Mountain Company holds.

While the chain of deeds under J. F. Scott are not in the transcript, yet it does appear that the first line in some one of them is 940 poles long instead of 894, as fixed in the grant. The first deed after the land was granted to Scott was his conveyance, in 1853, to J. S. Duncan. Whether

this line was then lengthened, or by some subsequent deed, does not appear. The entry evidently was not run out before issuance of grant. This is evident from the fact that, with the exception of the beginning corner, all the other calls are for stakes.

Unless there was on the ground an old marked line, evidently old enough to raise the presumption of a line marked at the time of the survey for the grant, the line should stop where the poles give out. The only proof of a marked line is that of Scott, who says it was a very recent line, and only 10 poles east of where the poles gave out. This marked line, however, would not avail defendants, for if it is only 10 poles east of the line as run by Scott, it would throw the disputed possession 24 poles east of this recent line.

If this first line was extended after Scarborough abandoned possession, then his possession would not avail defendants, for, if his possession was without the grant to Scott, then it would be under no color of title, and would be limited to the actual adverse possession.

So, if before Scarborough abandoned possession, a deed was made by Scott, under whom he held, conveying his grant by metes and bounds so as to include land not within his grant, the former holding of his tenant without his title-papers would not be of any advantage to his vendee beyond the limits of the actual possession, unless thereafter continued under his deed long enough to

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confer title to the limits of the deed. This would require a possession of seven years after deed embracing this possession. It therefore follows that this possession of Scarborough's must appear to have been within the grant to Scott, and that the fact that it was within the lines of the deeds which extended the first line of this grant will be unavailing, unless it also appear to have been within Scott's color of title when begun.

That Scott placed Scarborough where he did for the express purpose of perfecting his title to the lands within his grant, is clearly made out. Did he make a mistake, and locate him outside his title-papers?

This line of 1727 has been surveyed by three different surveyors. Scott, as we have already seen, found that if the first line be stopped at 894 poles, that this possession would be 34 poles east of the eastern line of the grant. He, however, found that if the first line be extended to 940 poles, that a small part of the possession would be included.

The country over which the first line runs was very rough and hilly. He says he ran a level line, and yet 894 poles did not include this inclosure.

S. H. Staples and E. R. Duncan both testify to having surveyed this line, and they each testify that this field of Scarborough's was, by their survey, west of the eastern line.

The survey by Staples was a surface survey. It does not appear whether that of Duncan was a

level or surface survey. Staples says that if he had made a level survey, the eastern line would have been from 60 to 100 poles farther east than he made it. It does not appear whether Staples and Duncan surveyed by the deeds calling for a first line of 940 poles or by the grant calling for only 894 poles. It is probable that their surveys were by the calls of the deeds. But if a surface line 940 poles long would include the disputed possession, it is most manifest that an horizontal survey of a line 894 poles would include this field.

The law construes a call for distance as a call for a point ascertained by horizontal survey. The method adopted by Scott was the right one. The method adopted by Staples was the wrong one, but disadvantageous to defendants. We have, then, Staples and Duncan, both competent surveyors, against Scott, equally as competent. The character of the gentlemen thus differing as to result of the survey, is unassailed. They seem to have no interest in the litigation. In view of the fact that this possession was taken by Scott, an old resident of the neighborhood, and an old surveyor, for the express purpose of perfecting his title against the Eastland grants, under which complainants hold, and of the further fact that two disinterested surveyors included this possession within the eastern line of defendants' grant, one of these surveys being as far back as 1854, and therefore long before this controversy arose, we

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are persuaded to find with the Chancellor that this possession, when the grant to Scott is properly surveyed, was within the grant, and that it continued for seven years, thus operating to bar complainants in so far as 1727 and 1949 interlap. The first and fourth assignments of error are therefore overruled.

Third.—The fifth assignment of error by complainants is to so much of the decree by the Chancellor as held that entry 1925, by Hannah M. Byrd, was a special entry, and that the grant thereon, which issued December 28, 1838, related to the entry, and was therefore a superior title to that of complainants, under an older grant but younger entry. This grant conflicts alone with complainants' entry 1949. The greater part of it lies upon 1727, already adjudged the better title. But as part of 1949 is covered by this entry and grant, not protected by defendants' entry 1727, it is plead as a superior outstanding title. This entry was made February 7, 1836. Complainants' entry was February 17, 1836. It is in the following words and figures: "H. M. Byrd enters 5,000 acres of land in said county, beginning on a stake at or near the east corner of J. F. Scott's 200-acre entry on the Carpenter road, thence running south 1,200 poles; thence east 1,500 poles; thence for complement to the beginning, so as to include the head-waters of Scutcheon."

This entry contains three locative calls: (1) The 200-acre entry of J. F. Scott, (2) the Carpenter

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road, (3) so as to include the head-waters of Scutcheon.

The 200-acre entry of J. F. Scott which is called for, is shown to have been an entry made in 1834, and was as follows: "J. F. Scott enters 200 acres of land in said county on the waters of Rock Creek, beginning on the line of Russell Scott's land, on the south side of said land, and then running an oblong with the Carpenter road so as to include said road." Russell Scott's land was an old settlement, and well known in the community. The Carpenter road was an old and well-known road. The J. F. Scott entry, though unsurveyed when the Byrd entry was made, was capable of location by one acquainted in the neighborhood. The entry would be bounded on the north by Russell Scott, and by laying it off in an oblong, with the Carpenter road inside, its probable location could easily be ascertained. The call in the Byrd entry that it should be so run as to include the head-waters of Scutcheon, is, under the facts of this record, a very precise locative call. The call to begin at or near the east corner of J. F. Scott's entry, it is said destroys the special character of the call, inasmuch as the Scott entry must have two east corners, a north-east and a south-east corner, and it is said that it cannot be determined which corner is called for. This might be so but for the fact that the survey must be so made as to include the head-waters of Scutcheon. Scutcheon was a small stream

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but well known. Scott, complainants' witness, says that if the beginning be at the north-east corner, as it was in fact afterwards surveyed, the entry will include the head-waters of Scutcheon, while if fixed at the south-east corner it would include part but not the entire head-waters of Scutcheon. The surveyor should, under such a state of facts, begin at the north-east corner of J. F. Scott's 200-acre entry, for he would thereby obey the direction that it should be so surveyed as to include the head-waters called for by the next locative call. This fact distinguishes the entry from those considered in 11 Hum., 299; 7 Heis., 719. The point of beginning is made particular and special by the subsequent requirements of the entry (2 Overton, 320; 1 Yer., 271) and brings it within the principle of the decision in 5 Lea.

That this Byrd grant has not been specially plead and relied upon as an outstanding title is immaterial. The complainants must not only have a title superior to that of defendants, but a title superior to any other. The weakness of the plaintiffs' title may be shown by proof without special plea. He must come prepared to show that he has the title to the land he sues for, and if it appear that the title is not in him, but in another, he must fail, although the defendant does not connect himself with such outstanding title. It is argued that this Byrd title is not a subsisting title, but one abandoned. This does not appear. It appears to be no more an abandoned

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title than did that of complainants before suit brought. There is, in fact, so far as this record appears, no adverse possession on parts of this grant outside of the interlap with 1727, and no reason why Hannah Byrd or her heirs may not at any time assert it. It is insisted that the 200-acre entry of J. F. Scott is not properly proven; that the copy in the transcript is not properly certified. No exception was taken upon the trial below, and there is now no error assigned, because admitted as evidence. We therefore conclude that the fifth assignment of error is not well taken.

Fourth.—The sixth assignment relates to entry No. 2688, known as the Peaky Knob entry. The Chancellor held the entry special, and that there had been an adverse possession of seven years, beginning before death of Louis Bleidorn. A very small part of this entry lies within complainants' title. There have been two possessions on the entry, one without complainants' title and one within. Scott says that about one-half of the improvement at the south end of the Peaky Knob entry is inside entry 1949. This possession is known as the one in the gap, and as the possession of McPeters and Stringfield. It was taken as far back as 1849, and has been kept up for a time sufficient to bar complainants. The Stringfield possession referred to, by an agreement of parties entered as a decree as only nineteen years old, has no reference to this Peaky Knob entry. The Stringfield possession referred to by that

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agreement, as shown by the deposition of Stringfield, was a modern one, and one inside entry 1727. The McPeters possession is not inside 1727, and the agreement manifestly refers to some other Stringfield possession. The assignment is not well taken.

Fifth.—The seventh assignment is to an entry known as No. 2244, or the old Hall place. But a small part of this entry is inside 1949, and all of the entry is covered by entry 1727, already held to be a title superior to that of complainants'. As the defendant, the Pilot Mountain Coal Company, owns both titles, it is unnecessary to say any thing further as to this assignment.

Sixth.—For convenience, the twelfth assignment of error will be disposed of before considering those that are intermediate. The Chancellor held that the south-east corner of complainants' entry No. 1950 was the two white oaks and two poplars, being the corner likewise of entries Nos. 1951, 1958, and 1959 in the Eastland and Lane system of entries and grants. The grant upon entry 1950 calls to "begin at a black gum and pointers, the north-east corner of entry No. 1949, in the name of H. Wilson; thence south 894 poles to a pine; thence east 1,000 poles to two large poplars and two large white oaks; thence north 894 poles to a stake and pointers; thence 1,000 poles to the beginning."

The grant upon entry No. 1951, which was subsequently surveyed, calls to begin "at a stake,

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the north-east corner of entry 1950, * * * at a point 1,000 poles east of a black gum, the north-west corner of entry 1950; * * * running thence south 894 poles to *two large poplars and two large white oaks*; thence east, crossing a creek, 1,000 poles to a sugar-tree; thence north 894 poles to the beginning."

The grant upon entry 1958 calls to begin at a pine, "the north-east corner of entry 1957; * * * running thence south 894 poles to a poplar; thence east 1,000 poles to a stake; thence north 894 poles to *two large poplars and two large white oaks*; thence west 1,000 poles to the beginning."

The grant upon entry 1959 calls to begin at "*two large poplars and two large white oaks*, the north-east corner of entry No. 1958 * * * thence south 894 poles to a chestnut, etc.; thence east 1,000 poles to a chestnut, etc.; thence north 894 poles to a sugar-tree; thence west 1,000 poles to the beginning."

It will be observed that these four grants are of the same size. They were all issued to Thos. B. Eastland. Each calls for a corner described as "*two large poplars and two large white oaks*," and these four grants should corner on each other and on these two poplars and oaks. It is true that these grants do not call for each other, except in the case of grant on entry 1959, which calls for these poplars and oaks as the north-east corner of 1958.

The Eastland grants were all issued about the

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same time and to T. B. Eastland, and upon entries made about the same time. The entries and grants correspond as to length of lines, and they cover almost the entire surface of Morgan County. They should connect, if properly run, the one with the other, and form a vast checker-board. The first in the series is entry No. 1927. Complainants' surveyor, Scott, has located 1950 upon his plot by beginning his survey at what he calls the beginning corner of the Eastland system of surveys, being a white oak, called for in entry 1927 as being 1,000 poles south of the junction of New River and Clear Fork. He also began at a living corner called for in entry No. 1933. Having run his first line south from the white oak corner, he then ran east from the living corner of 1933 until he intersected his south line. By the aid of these two living corners of these two remote entries, he was enabled, by pursuing course and distance and occasional marked lines, to locate 1949, 1950, and 1942 as he has plotted them. By this method the two poplars and white oaks are thrown more than a mile south-west of the south-east corner of 1950, as he has plotted it. These two poplars and two white oaks are shown to be well marked as a corner, with marks on the north, east, south, and west sides of the trees. Well-marked and very ancient marked lines are found on the ground running north, south, and east. Mr. Scott, who says these marked lines are very ancient, does not say whether he looked for a

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marked line running from this corner west. He does say that this corner was pointed out to him as the corner of 1959. When asked if this is not the south-east corner of entry 1950, he says that "to take the calls of all the surveys of the Eastland grants and plot them according to the calls, the north-west corner of 1959 would be the south-east corner of entry No. 1950 when they are plotted."

That these poplars and white oaks are a living and well-marked corner of three of the Eastland entries is too clear for dispute. Entry No. 1949, which adjoins 1950 on the west, has no living corner. Entry 1950 has likewise no living corner, unless the call for two large poplars and two large white oaks be a call for these existing trees marked as a corner, and which would be the true south-east corner, as testified to by complainants' own surveyor, if the Eastland system be plotted according to the calls of the several grants. Somewhere the harmony of the system of these surveys has to be disturbed. Somewhere an error has been made. Starting from the very remote corners of 1927 and 1933, probably twenty miles away, and then running by course and distance, locates 1950 as placed upon the plot. But this ignores a very notorious living corner of four of the grants. We are of opinion that the true south-east corner of 1950 is the living corner fixed by the Chancellor. The effect of this is not to drop 1942, which lies north of 1950, down to 1950. It has no known

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living corner, and does not call for either 1949 or 1950. It does call for the north-east corner of 1941, and must be located with reference to this call. The result is that between 1942 and 1950 there is a strip of land about one mile wide not embraced either by 1950 or 1942. Whether this result is a consequence of an error in the original survey of these entries, or of one made by Mr. Scott in his location of 1942, we cannot say. On the proof in this record 1942 and 1950 do not connect.

The twelfth assignment is overruled.

Seventh.—The third and eighth assignments will be considered together. Complainants' title is traced back to one Henry Wells, who, in 1849, conveyed the lands embraced in 1949 and 1950 by deed to Louis Bleidorn. The learned Chancellor found that at the date of this conveyance Julian F. Scott, then the owner of the lands embraced in entries 1727 and 1495, was in the actual adverse possession of each of these entries, and the deed of Wells was therefore champertous as to the lands embraced within said two entries. As heretofore stated, entry 1727 laps only on entry 1949, while entry 1495 laps both on 1949 and 1950, the larger part of the conflict being with the latter entry.

We have in the former part of this opinion decided that the Scarborough possession No. 2 on the plot was a possession under J. F. Scott, and within the interlap of 1727 and 1949. The Scarborough possession No. 1 is not within 1727, but

it is within the interlap of 1495 and 1949 as surveyed and plotted by defendants. This possession existed at date of Wells' deed to Bleidorn in 1849. The possession known as the "long" field and the other one known as the "Jo" field, under the weight of proof, were adverse, and by tenants of Scott at date of Wells' deed.

The first of these possessions was within the interlap of 1950 and 1495, as we have located 1950. The "Jo" field is likewise inside 1950, and within the lap of that grant upon 1495, as same is surveyed by defendants. Without now considering the question as to the proper survey of 1495, it is enough to say that the effect of the adverse holding of Scott by Scarborough at possession No. 2, at time of the conveyance of the lands embraced in entry 1949, was to make that deed champertous and void in so far as entry 1727 conflicts with the conveyance. The effect of the adverse holding of the "long" field at date of the conveyance of entry 1950 to Bleidorn was to make that deed champertous and void so far as it conflicts with entry 1495. It has been urged that, inasmuch as Wells was a non-resident of the State at the date of his deed to Bleidorn, his deed was not champertous, because the lands conveyed were not at the time held by one adversely under "deed, devise, or inheritance." Code, § 1779, provides that a conveyance by a non-resident shall not be void where, at the time of such sale, the lands were not held adversely by one holding un-

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der "deed, devise, or inheritance." Scott held the lands embraced in entry 1727 by a grant to himself, and he held the lands embraced in entry 1495 under a decree of the Chancery Court vesting title in him as a purchaser, at chancery sale, of the lands of Samuel Scott, sold to pay debts and for partition among his heirs. We think a possession by one holding under a grant or decree vesting title is one holding under deed within the meaning of the statute. The clear purpose of the saving in favor of non-residents was to make the sale good only where the holding was under no color of title. In such a case a naked adverse possession was not to affect the deed of a non-resident with champerty. This seems to be the construction put on the Act in *Whiteside v. Martin*, 7 Yer., 384-396. If the possession was under any conveyance purporting to convey title, the holding is under a deed in the meaning of the statute. By § 1780 of the Code it is provided that "champerty shall be presumed until the purchaser shows such sale was *bona fide* made."

It is now contended that the sale by Wells to Bleidorn was in good faith, and is therefore good. This provision just quoted was made in view of the exceptions in the previous sections of the Act. The provision is part of the original Champerty Act of 1821, and was construed in *Gass v. Maloney*, 1 Hum., 452, as applying not to the *bona fides* of the parties to the sale, but with reference to the provisions and policy of the Act.

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Eighth.—The seventh assignment raises the question as to whether entry 2244, which conflicts with entry 1949, is special. It is unnecessary to rule upon this, inasmuch as this entry lies inside 1727, and we have already decided that the latter entry was the superior title by reason of adverse possession.

Ninth.—The defendant, Wm. Lewallen, is the owner of entry No. 1800, upon which he obtained grant No. 22704. This was an entry for 2,500 acres. It laps upon complainants' two entries, 1950 and 1942. Plotting 1950 as having its south-eastern corner upon the two poplars and oaks, a very large part of this entry lies between 1942 and 1950, reducing the lap inside of 1950 to a very few acres. Lewallen has had a very ancient possession within the lap of his entry upon 1942, This possession antedates the death of Louis Bleidorn, and was continued more than seven years. Complainants concede that this possession has barred any recovery of so much of entry No. 1800 as lies within their entry No. 1942.

The ninth assignment assigns as error in the Chancellor the decree adjudging that the true boundary of 1800 is to be determined by the marked lines found upon the ground which extend the entry beyond the calls of the grant. If the grant to Lewallen be surveyed according to its courses and distances, it will contain 500 acres less than are found within the marked lines contended for by defendant. This grant is laid down on the

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plot made by Surveyor Scott in such way as to show by dotted lines the grant as surveyed by its calls and distances, and by solid lines the grant as it is marked off on the ground.

The defendant, Lewallen, says the entry was not surveyed all around before issuance of grant; that the original survey was made by one Staples, who surveyed only the eastern boundary of the entry and a part of the north line, marking a Spanish oak as the beginning corner. Afterward, the lines were all surveyed and marked by one Vaughn, a deputy county surveyor. He says he always claimed to these marked lines, and that his neighbors recognized them as his lines.

The grant calls for marked trees at the two eastern corners; the other calls are for distance and stakes. The proof is, that the lines running east and west, as marked by Vaughn after issuance of grant, are 130 poles longer than the distance called for in the grant, and that the eastern line, which is the only one claimed to have been marked at date of grant, shows much more ancient marks than the other lines. From Lewallen's own proof, it is clear that when he had his lines marked, he extended the length of his grant 130 poles beyond its true calls. His possession is not within this extension.

Entry 1800 is older than complainants' entry by a few months, but the grant is something over a year younger than complainants' grant. Lewallen does not state the date of his extension.

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But as his grant is younger than complainants' grant, and his extension was made after his grant, it follows that before he had extended and marked his lines complainants' entry was made and grant obtained. It is not a case where the State alone was concerned in the marking of his lines. Younger enterers had acquired rights, and their rights could only be affected by a processioning in strict accord with the Act of 1806, carried into the Code at § 2020 *et seq.* This Act requires notice. There is no pretense that notice was given adjoining land-owners, or that complainants or their privies in estate were present or countenanced this marking and extension. In discussing the early cases of *Whiteside v. Singleton*, Meigs, 207, and *Overton's Heirs v. Cannon*, 2 Hum., 264, this Court said, in *Chouning v. Simmons*, that in those cases "there were no adjacent owners, the land being vacant and unappropriated, and of course the question of notice could not arise, and did not, the controversy being between an enterer subsequent to the survey and the original grantee." 5 Hum., 303.

It would hardly seem necessary to argue the proposition that a subsequent enterer's rights cannot be affected by a resurvey and remarking of an older entry, unless the formalities of the processioning Act are shown to have been complied with, or unless, after knowledge, he acquiesces under such circumstances as amount to an estoppel. There is no element of estoppel here. The ac-

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quiescence of adjacent neighbors cannot affect complainants, who are not shown to have had any knowledge whatever of the extension of the lines of this conflicting entry, or of the survey and marking of these lines.

The question we regard as settled by the cases of *Chouning v. Simmons*, 5 Hum., 299; *Woodfolk v. Cornwall*, 1 Head, 273; *Nolen v. Wilson*, 5 Sneed, 333; and *Fly v. E. T. College*, 2 Sneed, 689. The case of *Williamson v. Buchanan*, 2 Overton, 278, is not in point. The remarking and extension was done before the rights of younger enterers accrued. So in the case of *Caruthers v. Crockett*, 7 Lea, 91.

Entry 1800 is the superior title only to the calls and courses contained in the grant, and the second line must stop at the point where the poles give out. It is not a case where course and distance yield to natural objects or to an old marked line presumably run before the grant issued. This grant calls for courses and distances only; and it not being shown that the lines as marked on the ground were so run and marked at the time the grant issued, the lines must terminate, as against the conflicting rights of a younger enterer, where the distance gives out.

The ninth assignment is therefore sustained.

Tenth.—The tenth assignment relates to the character of entry 1495, as to whether it is general or special. The entry is in these words:

“Samuel Scott, Sr., enters 5,000 acres of land

in said Morgan County, on both sides of Emory River, beginning on the east corner of Thomas Scott's 150-acre entry, on the east side of Emory, and then running up. Emory on both sides for complement, to include the complement after plotting out all prior legal rights." Entered September 15, 1832.

We held, in the case of *Scott v. Lewallen*, at the September Term, 1888, that this entry was not special on its face. It is now insisted that under the proof in the record the entry is special. The only evidence relied upon to show it a special entry is an entry for 150 acres in favor of Thos. Scott, and presumably the one called for in entry 1495. This Thos. Scott entry is in these words:

"Thos. Scott enters 150 acres of land in said county on the waters of Emory, adjoining the survey made in the name of Jacob Laymence, under the foot of the mountain, and running around under the foot of the mountain, joining the new ground."

There is no proof as to the location of this entry, none as to a survey in the name of Jacob Laymence, and none as to what is meant by the call for the foot of the mountain. In other words, there is no proof that the natural objects called for ever existed or were notorious. Neither is there proof as to the notoriety of the place on which Samuel Scott then lived. The Thomas Scott entry was one capable of being shown a special entry by proof of the existence of either the

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natural or artificial objects called for and their notoriety. No such proof being made, a call for it in the entry subsequently made by Samuel Scott does not make it a special entry. Of course, if it had been shown that the Thomas Scott entry was a notorious entry, or if this entry had been supported by proof of the notoriety of the objects called for in it, such proof would operate to make entry 1495 a special entry. In the absence of such proof, we are constrained to hold that it is not special, and that the grant thereon does not relate to it. *Wood v. Elledge*, 11 Heis., 607; *Barnes v. Sellers*, 2 Sneed, 33; *Brummett v. Scott*, 4 Heis., 321.

The entry belongs to that class of entries which may be aided by proof and thus shown to be a special entry.

The tenth assignment is sustained.

The thirteenth and fourteenth assignments relate to the finding by the Chancellor that there was an adverse possession within entries 1495 and 2661, both of which conflict with 1950, and that this possession began before death of Bleidorn, and was continued for seven years. It is sufficient to say that neither of these assignments is well taken. The weight of proof is with the finding of the Chancellor.

The fifteenth assignment, relating to a 100-acre claim in favor of Defendant Sexton, is likewise overruled.

A question has been made as to the supposed

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extension of the lines of 1495 after issuance of grant, and complainants insist that this entry and the grant thereon contains 1,800 acres less than as it is marked on the ground, and that the lines have been extended by a remarking.

There is no proof of this. Complainants' witness, Scott, when asked as to the age of the marked lines, says: "It is a very old line, but I think I noticed marks on the first line of the grant which appeared to be older." The presumption is that this very old marked line was the line of the original survey, and this proof is altogether insufficient to overcome this presumption.

This entry had been surveyed before complainants' entries were made, and it would require very clear proof—such as was made in the case of entry No. 1800—of a remarking and extension subsequent to the vesting of complainants' rights to overcome the presumption in favor of an old marked line.

The conclusion we reach upon the whole case is that the defendants have maintained their defenses to the lands embraced in their special pleas, and are entitled to an affirmance of the decree of the Chancellor, save as to the Defendant Lewallen, against whom complainants are entitled to a modification of the decree in so far as to allow them to recover so much of the lands embraced in entry 1942 as is not within the lines of entry 1800 when surveyed by the grant, the second line being terminated at the point where the distance gives

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out, ignoring the recently-marked line. A small part of entry 1800 laps upon entry 1950. This lap is not within Lewallen's entry when properly surveyed, and complainants will also recover this. The recovery by complainants embrace but a small part of the lands sued for, and but a small part of that for which they sued Lewallen. Complainants will therefore pay ninety per cent. of all costs, and the remainder will be paid by Lewallen.

Chief Justice Turney concurs in the result, but he does not believe that the case of *Smith v. Neilson*, 13 Lea, 461, should be followed, and dissents on this point of the opinion.

OPINION ON PETITION TO REHEAR.

(*Knoxville*. October 28, 1890.)

1. WILL, FOREIGN. *Passes lands in Tennessee without probate or registration here.*

Doctrine re-affirmed that a foreign will, executed and attested in conformity to our statutes, passes lands situated in Tennessee without probate or registration in this State where it has been duly proved and recorded at the testator's domicile in another State under statutes of that State identical with our own.

Code construed: § 3022 *et seq.* (M. & V.); § 2182 *et seq.* (T. & S.).

Case cited and approved: *Smith v. Neilson*, 13 Lea, 461.

2. SAME. *Case in judgment.*

B's will devised lands situated in Tennessee to his widow for life, and remainder to his children. This will was executed and attested as required by our statutes. It was duly proved and recorded in New

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York, the testator's domicile, under statutes of that State identical with our own. It was not recorded or registered in Tennessee. After B's death a stranger to his title took possession of the devised lands, and held them adversely for a period of more than seven years under an independent, but inferior, claim and color of title. This adverse possessor had no notice, actual or constructive, of B's will. He conveyed his supposed title to a purchaser who had none. The remainder-men sued this purchaser for the land within three years after the life tenant's death. Seven years' adverse possession was interposed as a defense to this suit.

Held: The suit was not barred. B's will passed a life estate to his widow and the remainder interest to his children as of its date, and therefore seven years' adverse possession taken and held pending the life estate could not bar remainder-men's suit brought in time after the life tenant's death.

3. SAME. *Effectual against strangers.*

The fact that the adverse holder was a stranger to B's title, and claimed under an independent color of title, does not affect the result declared.

4. SAME. *Effectual as to purchaser of adverse holder's claim.*

B's will affects the *purchaser* of the adverse holder's claim to the same extent as the adverse holder himself. Such purchaser is not protected against the unregistered will as a *bona fide* purchaser without notice.

5. LAND LAW. *Construction of grant including and excluding older claims.*

A grant including within its calls, but excluding from its operation by general description, lands that are held under "prior and legal claims," confers title upon the grantee to all the lands embraced within its calls which are not shown to have been held by older titles. The older titles and their location must be affirmatively proved by those who rely upon them, if they do not otherwise appear.

Cases cited and approved: *Bowman v. Rowman*, 3 Head, 47; *Fowler v. Nixon*, 7 Heis., 719.

6. SAME. *Same. Effect of proof of older titles.*

But when such "prior and legal claims" thus included and excluded by the grant are established and located by proof, that portion of the lands embraced by these older titles ceases to be part of the land covered by the grant. In surveying the grant its lines should be so run as to exclude them. The grant is not even color of title for that portion of the lands thus covered by the older titles.

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7. SAME. *Same. Same.*

And therefore adverse possession of part of the lands covered by the "prior and legal claims," and thus included and excluded by the grant, is not within the legal boundaries of the grant, nor hostile to the title claimed under it.

Cases cited and approved: *Hare v. Kelly*, 1 Hum., 163; *Smith v. Lee*, 1 Cold., 549.

(See also *Peck v. Houston*, 5 Lea, 227.)

8. SAME. *Case in judgment.*

Three grants, designated on map as 1925, 1949, and 1727, and having priority in the order named, had a common interlap, and 1949 and 1727 also interlapped outside 1925. There was possession (designated on map as "Scarborough possession No. 2") held for seven years by those claiming under 1727 upon the common interlap, but none upon the interlap of 1949 and 1727 outside 1925. 1949 included in its calls 5,590 acres, but purported to convey only 2,500 acres. It included "of prior and legal claims 3,088 acres of land." Claimants under 1949 sued those in possession upon the common interlap claiming under 1727. In defense 1925 was established as an outstanding title superior to 1949. The possession upon the common interlap was interposed to defeat this suit as to the land embraced in the interlap of 1949 and 1727 outside 1925.

Held: The common interlap is excluded from 1949, and possession thereon was not effectual to defeat title under 1949 where it interlapped alone with 1727.

9. SAME. *Pleadings. Estoppel.*

Complainants are not estopped, by suing for the whole of 1949, to insist that possession upon the common interlap is not within the legal boundaries of 1949, when defendants have affirmatively shown that 1925 was a "prior and legal" claim, and therefore excepted out of 1949.

10. SAME. *Assignment of Error.*

And the question as to the legal effect of this possession upon the title of 1949 is sufficiently raised by an assignment of error by claimants under 1949, averring that the Chancellor erred in holding that "the Pilot Mountain C. & M. Company has the superior title to complainants' entry 1949, and that it and those under whom it holds and claims title have had adverse possession more than seven years before the death of L. Bleidorn."

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II. SAME. *Same.*

And it is not material that among the reasons stated in support of this assignment of error the one now relied upon for rehearing was not embraced. A good assignment of error is not vitiated by the statement of insufficient reasons in its support.

FROM MORGAN.

Appeal from Chancery Court of Morgan County.
H. R. GIBSON, Ch.

S. N. VANCE, W. R. TURNER, and G. W.
PICKLE for Bleidorns.

HENDERSON & JOUROLMON, L. A. GRATZ, D. K.
YOUNG for Pilot Mountain C. & M. Company.

LURTON, J. Two petitions to rehear have been filed; one by the defendant, the Pilot Mountain Coal and Mining Company, and one by the complainants. By the first we are asked to reconsider our determination to adhere to the ruling made in the case of *Smith v. Neilson*, 13 Lea, 461, that a foreign will proved and recorded in the State of the testator's domicile according to the requirements of the laws of this State will pass lands in this State without record or registration here. The only reason now advanced for a reconsideration is the suggestion that the holding upon the effect of such an unregistered will was unnecessary

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to the decision of that case, and therefore *obiter*. This is not supported by a careful consideration of the facts of that case. The Court deliberately decided that the will was one of realty, and the principal question considered in the opinion of Judge Cooper was as to the validity of such a will as a muniment of title without registration in this State as required by Code, §§ 2183, 2184. The question was stated as being one vital to the rights of complainants, and as such it was fully discussed and expressly decided. The reasoning of Judge Cooper cannot be strengthened by any thing we can add. We have followed the case in more than one unreported cause, and are not at all disposed to question it as an authority. That the Pilot Mountain Coal Company claims title from a source entirely independent of the Bleidorn title is now advanced as a reason why it should not be affected by an unregistered will. This argument is based upon the syllabus in the Smith and Neilson case, wherein such an unregistered foreign will of realty is held to be valid as a muniment of title "*as between the parties*." This syllabus is no part of the decision, although we may have reason to believe it to have been prepared by the Judge who wrote the opinion of the Court. This, however, is unimportant, for the limitation put upon the effect of such a will is only one way of stating the effect of an unregistered conveyance, and does not mean that such an instrument would not be valid as between any others than persons

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claiming under the will, or under the title of the testator. All persons, except creditors existing or subsequent and *bona fide* purchasers, are, whether parties or not, bound by an unregistered conveyance. Code, § 2890.

The point decided in *Smith v. Neilson* was that at common law a will of realty duly executed was a muniment of title without regard to probate, and that our statute concerning foreign wills of realty, duly executed according to our law, did not operate to destroy the effect of such a will as a muniment of title by the requirement of registration in this State. The Pilot Mountain Coal Company are purchasers of a title inferior to that acquired by Louis Bleidorn. They do not claim under him, or under his heirs, but claim under an independent title utterly worthless unless perfected by adverse possession. Whether their vendor had had such adverse possession as operated to extinguish the paramount title vested by recorded grants and deeds in Louis Bleidorn, depended upon when it was begun, its duration and continuity. The outstanding life estate in Mrs. Bleidorn had been extinguished by adverse possession, but the remainder estate in complainants was asserted by suit before the statute had operated to destroy it. To say that a purchaser of a title wholly dependent upon adverse possession is a *bona fide purchaser* in such a sense that he cannot be affected by an unregistered will or deed which had operated to put the title in such a situation as to prevent the opera-

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tion of the statute against a remainder estate of an estate, would be putting a mere trespasser upon an equal footing with *bona fide* purchasers without notice of an unregistered conveyance by their vendor. This would be to add a most iniquitous provision to our registration law. The petition of the Pilot Mountain Coal Company must be dismissed with costs.

The complainants in their petition ask a rehearing as to the legal effect of the possession within entry 1727, and known as the Scarborough possession No. 2. This possession we held to be within the interlap of complainants' entry 1949 and defendants' entry 1727, and that it had continued for more than seven years, and, having been begun before the death of Louis Bleidorn, had operated to defeat complainants' title, so far as the entries or grants thereon conflicted.

Complainants now call attention to the fact that this possession is within entry 1925, known as the Hannah Byrd entry, and that this being a special entry, is excluded from the grant under which they claim, and that it therefore follows that this possession, not being within the grant and deeds under which they claim, is inoperative as an adverse possession within the interlap of 1727 and 1949. This question was not decided, and attention was not called to it either in the oral or printed arguments. It is therefore a question properly raised by petition for rehearing.

The grant to Eastland upon entry 1949 describes

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the granted land as a certain tract containing 2,500 acres, "beginning at a stake and pointers, the north-east corner of entry 1948; * * * thence south 894 poles to a stake and pointers; thence east 1,000 poles to a pine; thence north 895 poles to a gum and pointers; thence west 1,000 poles to the beginning, *including in the above calls of prior and legal claims 3,088 acres of land.*"

A calculation will show that the calls include about 5,590 acres, of which only 2,500 were granted; for the calls include, as stated in the grant, 3,088 acres of prior legal claims.

The effect of such a grant is to confer upon the grantee a legal title to all the lands within the calls of the grant not shown to have been held at the time by a superior title. When, however, it is shown that within the calls there was a superior legal claim by older special entry or by an older grant, then the effect of such proof is to exclude such older superior claim from the operation of the grant, and the grant, as to such excluded older claim, is not operative as color of title to the land so included and excluded. *Bowman v. Bowman*, 3 Head, 47; *Fowler v. Nixon*, 7 Heis., 719.

The defendant, the Pilot Mountain Coal and Mining Company, introduced the entry and grant to Hannah Byrd, and relied upon it as an outstanding, paramount title, operating to defeat complainants in so far as it conflicted with complainants' grant. We decided that it was a subsisting, par-

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amount title, and, as such, effective to defeat complainants to the extent of its interlap with 1949. Another necessary effect of this proof is to exclude the lands so held from the operation of complainants' grant—that is, complainants' grant must be so run as to *exclude* this older title. The Scarborough possession No. 2 was apparently within the interlap of the three grants; but while it was within the entry 1727, and within the interlap of 1925 with that entry, yet, being upon an older claim excluded from the grant on 1949, it was not in fact within the interlap of 1727 and 1949, and was not therefore a possession adverse to complainants. *Hare v. Kelly*, 1 Hum., 163; *Smith v. Lee*, 1 Cold., 549.

This result would not follow if the deeds under which complainants hold had embraced all the lands within the grant lines; but these deeds all described the lands as the lands covered by the grant, and none other. It follows that complainants had no paper-title which covered the possession of Scarborough, and his possession was not adverse to their title, being without their grant and deeds.

The defendants, the Pilot Mountain Company, make two answers to this petition to rehear upon this point. The first is that complainants, having in their bill claimed and sued for all the lands embraced within the calls of the grant under which they claim, are therefore estopped to now say that any lands thus included were in fact excluded from their title-papers.

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Under the cases of *Bowman v. Bowman*, 3 Head, 47, and *Fowler v. Nixon*, 7 Heis., 719, it devolves upon a defendant who disputes the title of a plaintiff who claims under a grant excluding older titles without definitely describing such excluded tracts, to show the existence of such older titles affirmatively; otherwise such a plaintiff may, under such a grant, recover all lands within the calls of his grant. This proceeds upon the ground that the grant operates to convey all lands to which the State had title, *all vacant land* within the calls, and that *prima facie* all was vacant, the fact of older claims not specifically appearing in the absence of definite description. Here the defendant made such proof, and its legal effect was to defeat complainants by showing a superior outstanding title. But another of the legal effects of such evidence was to entirely exclude this paramount title from the operation of complainants' grant—by force of the excluding words of the grant. We do not think that complainant is estopped from insisting upon the full legal effect of the proof made by defendant of an outstanding paramount title.

The defendants' next answer is, that under the assignment of errors no such question is raised. The first assignment of error insists that it was error in the Chancellor to hold and decree that "the Pilot Mountain Coal and Mining Company has the superior title to complainants' entry 1949, and that it and those under whom it holds and

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claims title have had adverse possession more than seven years before the death of L. Bleidorn." Now, it is manifest that if the possession of defendant was of a part of 1727 not within the interlap of 1949, that such possession could not be adverse. That this assignment is broad enough to cover the question of the legal effect of a possession without the interlap must be obvious. That complainant, in his statement of reasons in support of this assignment has failed to state the particular one now relied upon, is not fatal. We have construed the rule requiring assignments of error with liberality, and to hold that a good assignment is rendered bad by the insufficiency of the reasons advanced in its support would be highly technical and a sticking in the bark.

In view of the fact that there has been no adverse possession within the interlap of 1727 and 1949, it becomes now necessary to rule upon complainants' seventh assignment, no opinion having been expressed in the original opinion. This assignment relates to the character of entry 2244, known as the old Hall place. This entry conflicts with entry 1727 and entry 1949. It is a younger entry than complainants' entry 1949, and the grant thereon is an older grant than complainants' grant. But we are of opinion that, under the proof, this entry is a special entry, and that defendants' grant thereon therefore relates to the entry. The legal effect of this is to make defendants' grant the older and better title, it not being shown that

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complainants' entry 1949 was a special entry. The decree heretofore entered will be so modified as to permit a recovery by complainants of so much of entry 1727 as is within the interlap of 1949 and not embraced within special entries 2688 and 2244, complainants' grant on entry 1949 being so plotted as to exclude all lands embraced within the older claim known as the Hannah Byrd entry.

In plotting out the lands recovered, the map of Surveyor Scott will be adopted, except in so far as we have in this opinion decided it to be erroneous.

The decree as to costs will be so modified as to tax one-fifth of the entire costs to the Pilot Mountain Coal and Mining Company.

Buxton v. State.

BUXTON v. STATE.

(*Knoxville*. September 30, 1890.)

CRIMINAL PRACTICE. *Record of oath administered to officer in charge of jury insufficient, when.*

This Court will reverse a felony case where the entry of record as to the swearing of the officer placed in charge of the jury is in this language: "The officer was sworn according to law to keep them [the jury] together, separate and apart from all other persons, not to talk with them about the cause, nor allow others to do so, until he returned them into Court to-morrow morning."

FROM MORGAN.

Appeal in error from Circuit Court of Morgan County. S. A. ROGERS, J.

W. L. WELCKER and J. H. LEWALLEN for Buxton.

Attorney-general PICKLE and HENDERSON & JOUROLMON for State.

LEA, J. Buxton was convicted in the Circuit Court of Morgan County of murder in the first degree, and has appealed from the judgment to this Court. It is insisted there is error in the record, first, because the oath administered to the officer in charge of the jury was insufficient; and,

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secondly, that there was error in the charge of the Court for failure to charge upon the effect of drunkenness in reducing the killing from murder in the first degree to murder in the second degree.

The record shows the following entry as to the oath administered to the officer in charge of the jury: "The officer was sworn according to law to keep them together, separate and apart from all other persons, not to talk with them about the cause, nor allow others to do so, until he returned them into Court to-morrow morning." While it is said he was sworn according to law, the oath is set out, and this Court has repeatedly held that such an oath is insufficient. An impartial jury, selected and kept free from all outside or improper influences, has always been regarded by our Courts as necessary to a fair and impartial trial. In fact, without it the administration of the criminal law would become a farce. The officer should be sworn to keep the jury separate and apart from all persons, and not allow them to communicate with any person, or any person to communicate with them, and not to communicate with them himself about the trial of the case further than to ask them if they have agreed.

There were several witnesses who testified as to the drunkenness of the prisoner upon the day, and at the time of the killing, and it is insisted it was the duty of the Judge to instruct the jury as to the effect of drunkenness; that he should have stated to the jury that if drunkenness existed to

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such an extent as to render the prisoner incapable of forming a premeditated and deliberate design to kill, then he would not be guilty of murder in the first degree.

While the proposition of law insisted upon is correct, yet, looking to the charge upon drunkenness, and to the failure of the prisoner to ask for a fuller exposition of the law, we base our action of reversal upon the error that the officer in charge of the jury was not properly sworn.

The judgment will be reversed, and the case remanded for a new trial.

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(Knoxville. October 2, 1890.)

1. WILL. *Devise that is not void for remoteness.*

Testator made devises to each of his two sons individually, and another to them jointly as trustees, and then provided as follows:

"*Fourteenth.*—Finally, should either of my sons die, leaving no legal descendants, then, and in that event, all the property that should have been his if living shall go to and become the property of the survivor and his legal descendants, and the property of the survivor of the trustees mentioned, for the uses and trusts of the wards, George and Amelia, subject to all the restrictions and limitations contained in that portion of this instrument creating such trusts."

Held: This devise is not void for remoteness. The contingency provided for is the death of one son, "leaving no legal descendants," while the other son still lives.

Cases cited and approved: *Booker v. Booker*, 5 Hum., 505; *Brown v. Brown*, 86 Tenn., 277; *Bramlett v. Bates*, 1 Sneed, 555.

2. SAME. *Devise that is void for remoteness.*

But the next succeeding clause of said will is void for remoteness. It is in these words:

"*Fifteenth.*—In conclusion, I declare it to be my fixed purpose and intention that the legal or equitable right of no portion of my estate herein bequeathed shall pass out of my legal descendants, or the legal descendants of my children, to strangers in blood; but, for want of legal descendants from any branch of my family, shall return to and remain the property of the survivors of my family."

Held: This devise is void for remoteness. The intention is "expressly and plainly declared" in this clause to lock up his estate in his descendants to the remotest generations.

Cases cited: *Lewis v. Claiborne*, 5 Yer., 371; *Booker v. Booker*, 5 Hum., 505; *Bramlett v. Bates*, 1 Sneed, 555.

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3. SAME. *Construction of distinct and independent clauses.*

The two clauses, being distinct and independent in their provisions, the invalidity of the fifteenth does not affect the fourteenth clause.

Case cited and approved: *Randolph v. Wendel*, 4 Sneed, 670.

4. SAME. *Code, § 2815 (M. & V.), construed.*

In all cases where it is perfectly clear upon the face of the will that devises over are either void or not void for remoteness, there is no room for the application of the statute, which provides:

“Every contingent limitation in any deed or will made to depend upon the dying of any person without heir or heirs of the body, or without issue of the body, or without children or offspring or descendants or other relative, shall be a limitation to take effect when such person dies without heir, issue, child, offspring, or descendants or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared in the face of the deed or will creating it.”

Code construed: § 2815 (M. & V.); § 2009 (T. & S.).

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

WEBB & McCLUNG for Armstrong.

L. A. LINDSAY for Douglass.

CALDWELL, J. This is a bill for the construction of a will, and to remove clouds from title to land.

Drury P. Armstrong died testate in September, 1856, and his will was probated in October following. He left surviving two sons and two children of a deceased daughter, all of whom were favored objects of his bounty.

By the second clause of his will he gave certain real estate to his son, Robert H., by the third clause he gave certain other real estate to his other son, Marcellus M., and by the fourth clause he gave still other real estate to his two sons, as trustees for his two grandchildren, George A. and Amelia C. Hill, children of his deceased daughter, Adelia A.

The fourteenth and fifteenth clauses contain certain limitations upon the devises of the second, third, and fourth clauses. In May, 1890, Marcellus M. Armstrong filed the bill in this cause impeaching those limitations as void for remoteness, and seeking to have them removed as clouds from his title.

The two clauses so impeached are as follows:

"Fourteenth.—Finally, should either of my sons die, leaving no legal descendants, then, and in that event, all the property that should have been his if living, shall go to and become the property of the survivor and his legal descendants, and the property of the survivor of the trustees mentioned, for the uses and trusts of the wards, George and Amelia, subject to all the restrictions and limitations contained in that portion of this instrument creating such trusts.

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"*Fifteenth*.—In conclusion, I declare it to be my fixed purpose and intention that the legal or equitable right of no portion of my estate herein bequeathed shall pass out of my legal descendants, or the legal descendants of my children, to strangers in blood; but, for the want of legal descendants from any branch of my family, shall return to and remain the property of the survivors of my family."

The law favors free alienation of property and abhors perpetuities. All limitations over which depend on an indefinite failure of issue, a total extinction of descendants of the first taker, are deemed too remote and void, as tending to create perpetuities; while, on the other hand, those depending on a definite failure of issue, or a contingency which must happen, if at all, within the period of a life or lives in being, twenty-one years and ten months, are good executory devises, and will be upheld by the Courts. 4 Kent, 295 and 317; 1 Jar. on Wills (by R. & T.), 518; 2 Red. on Wills (Ed. of 1866), 845; 1 Wash. on R. P., p. 97, Sec. 57; *Booker v. Booker*, 5 Hum., 505; *Brown v. Brown*, 2 Pickle, 277.

After making specific devises to each of his two sons individually, and to them jointly as trustees for his two grandchildren, the testator in this case used the language of the fourteenth and fifteenth clauses, which we have quoted at large.

The former of these clauses relates alone to the death of either of those sons without legal

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descendants while the other one is yet alive, and, in that event, to the further disposition of the property already devised to the son so dying. It has no reference to the death of the other son or of the grandchildren, and makes no disposition of the property previously devised to them; but it creates contingent limitations over in their favor, and in that way increases the amount of their estates.

The fifteenth clause is more comprehensive, and may embrace in its scope all the property devised—that which the surviving son and the grandchildren received under the will in the first instance, as well as that which they might receive from the deceased son under the fourteenth clause, or all of it as originally devised in case the contingency contemplated in the fourteenth clause should not happen.

There is no necessary connection between the provisions of the two clauses. Therefore, they will be considered and construed separately.

The fourteenth clause, when summarized, is but a direction that in case either of the testator's two sons should "die leaving no legal descendants," the property that would belong to that son "if living," shall pass to the surviving son in his own right, and as trustee for the two grandchildren.

Through the zeal of the Courts to prevent perpetuities, the words "die leaving no legal descendants," and other like phrases, were long ago given a uniform and technical meaning, whereby they were held to import an indefinite failure of

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issue, and all limitations over depending on them were declared inoperative and void. But finally, to avoid an equally hurtful extreme, it became the practice of the Courts to explore the whole will and lay hold of some other expression or circumstance, if necessary to defeat the arbitrary meaning of such words and thereby give force and effect to the manifestly lawful intention of the testator. Such is the rule of construction to-day, where the common law on this subject is enforced. 4 Kent, *277-279; *Bramlet v. Bates*, 1 Sneed, 555; 1 Jar. on Wills (by R. & T.), 519, note '15.

Applying that rule here, and looking to the whole of the fourteenth clause, it becomes certain that the testator did not use the words, "die leaving no legal descendants," in their technical sense.

Providing for the death of either of his sons without legal descendants, he made an executory devise of "the property that should have been *his if living*," meaning thereby the property that should belong to the deceased son under a previous devise of the will at the time of his death, and not the property that might belong to the longest liver of the deceased son's descendants, when such person should die and the line become extinct. This shows it to have been the intention of the testator that the property in question was to be ascertained and the limitation over to take effect at the death of the son, the first taker. Moreover,

the executory devise is in favor of "the survivor" of the two sons and "the survivor of the trustees mentioned" in the fourth clause. The two sons were living when the will was made and when it went into effect. Both of them were made trustees by the testator for his grandchildren. When he says, "should either of my sons die leaving no legal descendants, * * * the survivor," etc., he refers to one of them as dying and the other as still living. When he says "the survivor of the trustees mentioned" he means that one of his two trustees (the brothers), who shall outlive the other one.

It is the survivor of the testator's two sons and the survivor of the trustees mentioned (they being one and the same person), and not the survivor of an after generation, who is to receive for himself and as trustee the property of the other son dying without legal descendants.

One son and trustee could not possibly be the survivor of the other son and trustee, and take property from him, unless living himself at the time. Hence the limitation over must take effect in the life-time of a person living when the will was executed.

Then, it results from a construction of the whole of the fourteenth clause of the will before us, that the contingency therein provided for must of necessity come to pass, if at all, at the death of one of the testator's sons and in the life-time of the other one, and that the limitation over constitutes a good executory devise.

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Whatever the language may be, if the limitation over must, by the terms of the will, take effect within the lawful period, it is valid. 7 Term R., 102; 13 Wend., 440; 1 Jar. on Wills (by R. & T.), 548; 2 Red. on Wills (Ed. 1866), p. 850, Sec. 19; 2 Pickle, 277.

Not only are the words, "die leaving no legal descendants," rescued from their technical meaning by the context, but the same result is accomplished by the Act of 1852, which is as follows:

"Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue of the body, or without children or offspring or descendants or other relative, shall be a limitation to take effect when such person dies without heir, issue, child, offspring, or descendants, or other relative, as the case may be, living at the time of his death or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared in the face of the deed or will creating it." Code (M. & V.), § 2815.

By the terms of this statute the contingent limitation of the fourteenth clause of this will must take effect when either of the testator's sons shall die leaving no legal descendants, "living at the time of his death or born to him within ten months thereafter;" a contrary intention not being "expressly and plainly declared in the face of the will creating it." So that by the statutory con-

struction, and by a natural interpretation of the whole clause, by the statute and without it, the technical words of the clause are qualified in such a manner as to preserve the executory devise and effectuate the manifest intention of the testator.

It is not to be inferred, however, from this reference to the harmony of the statutory construction with that clearly demanded by the context, that the statute is applicable only where there may be such concurrence. On the contrary, the statute applies to, and the legislative construction controls, the contingent limitation in every case, "unless the intention of such limitation be otherwise expressly and plainly declared in the face of the deed or will creating it." If it be clear that the testator, in a given case, intended the limitation to take effect within the lawful period, then the statute is not needed; if his intention is doubtful, the statute must be applied and the limitation upheld. It is only where the testator expressly and plainly declares his purpose to create a perpetuity that the contingent limitation will not be saved by the statute. The provision of the statute is the equivalent of a conclusive presumption that the maker of the deed or will intended the limitation to take effect within the lawful period, unless the contrary is expressly and plainly declared.

Nevertheless, since the statute, as before, perpetuities are unlawful.

With the provision of the statute in view, we

come next to the consideration of the fifteenth clause, whose limitations, if preserved at all, must be preserved by the statute. By this clause the testator declares it to be his fixed purpose and intention that no part of the estate devised shall pass out of his legal descendants, or the legal descendants of his children, to strangers in blood, but that, for want of legal descendants from any branch of his family, the property of such branch shall return to and remain the property of the survivors of his family.

The vigorous language here used places this clause within the exception of the statute, and leaves its validity to be determined by other rules. No doubt is left that the testator intended to lock up his estate in his descendants and the descendants of his children through the remotest generations, and that as one branch of his family become extinct others shall come into the enjoyment of its share of his estate, the process going on *ad infinitum*.

He expressly and plainly declares such to be his "fixed purpose and intention"—not exactly in the words we have used, but in language of the same import.

The word "survivors," as used in the conclusion of this clause, does not stand in the way of this construction, or indicate a different intention on the part of the testator from that we have attributed to him.

It is true *survivor* is a restrictive word, and

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that its employment, in connection with such phrases as "dying without issue," or "without legal descendants," has been held to qualify their technical meaning, and authorize them to be read as dying without issue, or without legal descendants, *at the time of the first taker's death*. *Cutter v. Doughty*, 23 Wend., 513; *Lewis v. Claiborne*, 5 Yer., 371; 5 Hum., 505; 1 Sneed, 555; 4 Kent, *278, 279.

But such effect can properly be given the word only when it is intended to designate one of a number of persons named in a will (as in the fourteenth clause of the will before us), or one of a class not so specifically named, but referred to as then in existence, or contemplated as coming into existence before and continuing in life at the time of the death of the first taker.

Certainly it can produce no such result when, as here, it is manifestly intended to designate the longest lived of three several lines of descendants who may represent the testator's family in the remotest generations.

The conclusion is that the contingent limitations of the fifteenth clause are void for remoteness, and that the first takers hold the property devised to them in other parts of the will, entirely discharged from such limitations and as if they had never been imposed. 2 Wash. on R. P., 703.

It cannot be that the falling of those limitations will pull down with them the limitations of the fourteenth clause; for, as already seen, there

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is no necessary connection between the two clauses. They contain separate and distinct limitations, without referring the one to the other. Therefore, by the soundest rule of construction, each must stand upon its own terms, and be interpreted separately. *Randolph v. Wendel*, 4 Sneed, 670.

The decree of the Chancellor adjudging both fourteenth and fifteenth clauses valid, is affirmed as to the former and reversed as to the latter.

Since the defense is by minors who have no fund in Court, and the bill is for the benefit of complainant, he will pay all costs.

Staples v. State.

STAPLES v. STATE.

(*Knoxville*. October 2, 1890.)

CRIMINAL PRACTICE. *Adverse comment upon defendant's failure to testify error, when.*

Adverse comment upon defendant's failure to testify in a criminal case, made by the State's attorney in his argument before the jury, constitutes reversible error, where the Court fails, upon proper exception being taken thereto, to require counsel to desist from that course of argument, and to instruct the jury to disregard what had already been said.

Constitution construed: Art. I., § 9.

Acts construed: Act 1887, Ch. 79.

Cases cited and approved: 15 Mo. Appeals, 593; 84 Ind., 563; 123 Mass., 239; 31 Kan., 355.

FROM MORGAN.

Appeal in error from Circuit Court of Morgan County. S. A. ROGERS, J.

SAM EPPS YOUNG, ROBERT WALTON, HENDERSON & JOUROLMON, and D. K. YOUNG for Staples.

Attorney-general PICKLE and SCOTT & WELCKER for State.

LURTON, J. The appellant in error has been convicted of manslaughter. He did not testify as a witness in his own behalf. The attorney representing the State, in his argument to the jury, commented upon certain threats testified to as having been made by the deceased in the presence and hearing of the defendant, by saying that "Mr. Henderson argued that Staples heard the threat that he (Hall) 'would cut his throat before sundown.' Now, he never heard it. If he did, little Sam did not tell you so, and Staples himself did not tell you so." "Now Mr. Staples, the defendant, could tell you, if he could speak, that the blow he got did not hurt him." "He [Staples] does not tell you that he did that stabbing in self-defense." It is not distinctly stated in the bill of exceptions that this language was at the time excepted to, but the Circuit Judge, in the bill of exceptions, annexes an explanation in these words: "The language of counsel for the State seemed to the Court subject to different constructions, and, not understanding with certainty that he should be understood as referring to the fact that defendant had not testified, no interruption was had." From this we infer that defendant's counsel did object, and that his objection was overruled for the reason stated above. This was error. The Act of 1887, Ch. 79, permits the defendant in a criminal trial, "at his own request, but not otherwise," to testify as a witness therein. The Act further provides "that the failure of the parties defendant to make

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such request and to testify in his own behalf shall not create any presumption against him." This provision is in accord with the bill of rights, wherein it is provided that in all criminal prosecutions the defendant "shall not be compelled to give evidence against himself." No inference of guilt can be drawn from the failure of a defendant to testify for himself. Were it otherwise, a defendant on trial might be put in the awful situation of being required to commit perjury to avoid the consequences of his failure to avail himself of the privilege extended him by the statute. The statute might thus become an ingenious machine to compel a conscientious defendant to testify against himself. The Circuit Judge should have promptly interfered and checked any line of argument based upon the failure of Staples to testify. The language used by the State's attorney was, in fact, susceptible of no other construction than that guilt was to be inferred from the failure of the appellant to testify. Similar statutes are in force in many of the States. The question here presented has arisen many times, and the decisions of the Courts have been practically unanimous in holding that no argument to the jury based upon the failure of a defendant to testify is permissible. *State v. Brownfield*, 15 Mo. Appeals, 593; *Showalter v. State*, 84 Ind., 563; 123 Mass., 239; *State v. Mosely*, 31 Kan., 355.

An argument based upon the failure of the defendant to testify cannot but be most prejudicial

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to the defendant, and where the attention of the trial Judge is called to such argument, and he fails to interfere and fully instruct the jury, it is reversible error.

For this error the judgment will be reversed and the case remanded for a new trial.

Railway Company v. Lewis.

RAILWAY COMPANY v. LEWIS.

(*Knoxville*. October 4, 1890.)

1. INTERSTATE LAW. *Decisions of Courts of another State followed by our Courts, when.*

In suits brought in Courts of this State to recover for personal injuries inflicted in another State, the law affecting the merits of the controversy, as declared by the Courts of the latter State, controls when in conflict with the decisions of our own Courts.

(See *Railroad v. Foster*, 10 Lea, 351.)

2. SAME. *Same. Case in judgment.*

Suit against railway company by its employe for personal injuries inflicted in Georgia. There was proof tending to show plaintiff guilty of contributory negligence.; The Court charged in conformity to the Tennessee decisions on this point, which differ materially from the Georgia cases.

Held: This was error. The Court should have charged the law as declared by the Georgia Courts.

FROM BRADLEY.

Appeal in error from Circuit Court of Bradley County. ARTHUR TRAYNOR, J.

W. M. BAXTER and MAYFIELD & SON for Railway Company.

S. P. MADDOX for Lewis.

Railway Company v. Lewis.

TURNER, Ch. J. This suit was brought to recover damages for injuries received by an employe in Georgia. The Georgia law governs.

There is in the transcript evidence tending to show negligence on the part of the defendant in error at the time of the injury.

The Court charged the jury: "If the defendant's negligence was the direct or proximate cause of the injury, the plaintiff can recover, even though the plaintiff may have been at fault, if his fault was less in degree than that of defendant," etc.

This was error. The rule as laid down in 58 Ga. R., 485, is "to make a *prima facie* case for recovery, a railroad employe, suing the company for a physical injury resulting from an act in which he participated, must prove either that he was not to blame or that the company was. The latter, in reply, may defend successfully by disproving either proposition—that is, by showing that the plaintiff was to blame or that the company was not. If both were to blame, or if neither was, the plaintiff cannot recover."

The Court should have so charged. The rule in Tennessee is not applicable to the case.

Reverse and remand.

James County v. Hamilton County.

JAMES COUNTY v. HAMILTON COUNTY.

(Knoxville. October 4, 1890.)

1. INJUNCTION. *Dissolution at chambers. Notice.*

Upon notice thereof for less period than five days, the Chancellor has no jurisdiction of motion to dissolve injunction at chambers.

2. SAME. *Motion to dissolve entertained in term without notice.*

In term the Chancellor may dispose of motion to dissolve made in vacation without notice, and he may appoint special term for that purpose.

3. CONSTITUTIONAL LAW. *Legislature has no power to abolish and partition counties.*

The Legislature has not power, by its mere act, without a vote of the people to be affected, to abolish an established county and divide its territory among the adjoining counties.

Case cited: 12 Ill., 391.

Question reserved: Can a county be abolished and its territory partitioned among other counties even with the consent of the people?

FROM JAMES.

Appeal from Chancery Court of James County.
W. H. DEWITT, Sp. Ch.

P. B. MAYFIELD, S. P. GAUT, D. A. GAUT, and
J. E. MAYFIELD for James County.

SHEPARD, WATKINS & BATES for Hamilton County.

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TURNEY, Ch. J. An Act of the Legislature, approved March 11, 1890, by its first section abolished the county of James, and restored its territory to the counties of Hamilton and Bradley, from which it had been formed in 1871.

This bill is filed charging that the Act of 1890 is unconstitutional and void, enjoining action under it, and asking that it be declared null.

On April 9, 1890, notice was served on complainant that on April 12, 1890, motion would be made to dissolve the injunction. The motion was made, and the decision reserved, but never rendered.

On May 14 the Chancellor ordered a special term of the Chancery Court to be holden on June 14, "to render such decree as may be necessary in the suit of James County against Hamilton County *et al.*, and for no other purpose."

At the special term the Chancellor held the Act to be constitutional, and retained the injunction in force until the question could be determined by this Court.

It is now objected that the Court was not authorized to entertain the motion to dismiss in the absence of notice of such motion to complainant. This objection is not well taken. Our statute provides: "A defendant may move to dissolve or modify an injunction in vacation before the Chancellor of the division in which the bill is filed, either for want of equity in the bill or upon the coming in of the answer to be heard upon certi-

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fied copies of the bill or bill and answer; but five days' notice of such application shall be given to plaintiff or his solicitor."

"A motion to dissolve an injunction may be made at any time upon answer or for want of equity on the face of the bill." Code (M. & V.), §§ 5194, 5195.

It is clear to us that the action of the Chancellor in ordering a special term was induced by two considerations:

First.—The notice to dissolve was insufficient—and, in fact, no notice—the law demanding that the plaintiff *shall* have five days' notice, while in this case there were only about three; and therefore there was no jurisdiction in the Chancellor to act out of term.

Second.—The matter being one of public importance, the Chancellor correctly determined to pass upon it as promptly as the law would allow. No notice of motion to dismiss in term time is necessary. The Chancellor may dismiss of his own motion. The order appointing the special term called attention directly to the purpose of the Court to make such decree as he thought necessary in this case, and was notice to the complainant that every step that could be taken in the cause would or might be asked for.

This brings us to a consideration of the constitutionality of the Act. Our Constitution, Article X., Section 4, ordains:

"New counties may be established by the Leg-

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islature, to consist of not less than two hundred and seventy-five square miles, and which shall contain a population of seven hundred qualified voters. No line of such county shall approach the court-house of any old county from which it may be taken nearer than eleven miles, nor shall such old county be reduced to less than five hundred square miles. * * * No part of a county shall be taken off to form a new county, or a part thereof, without the consent of two-thirds of the qualified voters in such part taken off; and when an old county is reduced for the purpose of forming a new one, the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the Legislature, nor shall the seat of justice of any county be removed without the concurrence of two-thirds of the qualified voters of the county."

Article X., Section 4, contains all the provisions on the subject of counties, county lines, etc.

From it it is clearly manifest the authority and only authority conferred is to build up, and not to pull down. It is equally apparent that it never occurred to the framers that a county could be destroyed or dissolved by an arbitrary Act of the Legislature. The expression of the one thing is the exclusion of the other.

If the Constitution is so careful of the rights of old counties in taking from them fractions to form new counties; if it is so watchful of the rights of citizens in county seats, it follows that

it is also jealous of any power that might utterly destroy old counties. At the passage of the Act before us, James County was, in a legal sense, as much an "old county" as Washington or Davidson, and had all the rights of such.

In all the cases that have arisen in the State touching county lines, the reduction of counties to form new ones, the removal of county seats, etc., the Courts have invariably held to the restrictions of the Constitution.

If two-thirds of the qualified voters in the part taken from an old county to go to the formation of a new is required, why is not the same principle, derived from the same instrument—the Constitution—applicable to the effort to divide an old county into two parts, giving one part to Bradley and another part to Hamilton? If it requires two-thirds of the qualified voters of a county to remove its seat of justice to another point in that county, by what process of reasoning can we conclude that a seat of justice may by legislative enactment be divided between the seats of justice of two adjoining counties?

If the voters must by a two-thirds majority consent to a removal or to a detachment from one and attachment to another county by the terms of the Constitution, why is not the same rule applied to the purpose of dissolving a county, and then attaching its several parts to other counties, if it can be done at all?—a very doubtful question.

As we have seen, James County was regularly

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formed and organized. It had built its courthouse, jail, and other public buildings; had its officers in all respects as other counties. Now, must all these be swept from it without the consent of its people? Must the moneys expended in the nineteen years of its existence go for nothing? Of course these things must be if the Act is constitutional.

The public buildings and improvements which have been paid for, or its people yet to be taxed to pay for, cease to be of use as public property, while the money paid, or to be paid, is a total loss to the tax-payers.

It is insisted that as the Constitution does not prohibit by its terms the dissolution of a county, therefore the Legislature may dissolve it. The answer to this argument is, as we have already intimated, that it was never intended that such thing should be done, unless, perhaps, by a vote of the people (about which we intimate no opinion), as in the case of the taking off a part of a county to form a new one, which is a partial dissolution, and the only one provided for in the Constitution.

A county is a government within a government, and its voters must be consulted in all matters pertaining to it. It is not created, nor can it be dismembered or destroyed by an arbitrary legislative breath. The Legislature having once granted its consent, cannot of its mere motion withdraw it. The county was made at the instance of the

people, and for its people, and can be changed or abolished, when at all, only by their consent. If the Legislature may dissolve one county and divide it out amongst its neighbors, it may abolish all, and destroy the State. It may divide Davidson or Knox, and remove their county seats to any other county by its legislative partition.

The sole purpose of the Constitution was to build up and preserve, hence its restrictions about legislative interference with organized counties.

It may be said to have been the policy of the framers of the Constitution of 1870 to encourage the creation of new counties, as it reduced the approach to county seats of old counties in the formation of new ones to eleven miles instead of twelve, as ordained by the Constitution of 1834.

We are aware of but one case in the Union in which the question here presented has arisen—*The People v. Marshall*, 12 Ill., 391—in which it was held: "The Legislature cannot abolish counties, and form the territory of which they were composed into one or more counties, without submitting the Act to a vote of the inhabitants affected by the change."

In that case the county of Gallatin had been divided, and the county of Saline formed of part of it. The Legislature undertook "to create the county of Gallatin out of the counties of Gallatin and Saline," in other words, to abolish Saline and add its territory to Gallatin.

The Constitution of Illinois is in this respect very similar to ours.

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The fact that the question has only arisen in the two cases, goes to show that Legislatures have heretofore interpreted Constitutions as giving no such power, either by implication or in terms.

If desirable to abolish or change counties, the people interested ought to be consulted. Such are the spirit and policy of constitutional popular governments. They can and ought to be carried out.

The Legislature cannot do indirectly a thing not to be done directly.

To abolish a county and give its territory to others, is to take from the one and add to the others without the consent of the people to be affected. A Constitution which prohibits a small taking off, or appropriation, certainly protects against entire destruction. The act is void.

Reverse.

RAILWAY COMPANY v. AIKEN, Adm'r.

(Knoxville. October 11, 1890.)

1. PRACTICE. *Exceptions to evidence.*

Exception to irrelevant evidence is insufficient to render its admission erroneous, where upon the taking of the depositions containing the objectionable matter *general* exception was taken to the *questions* but none to the *answers*, and no ruling made by the Commissioner, and where it does not appear that any specific exception was made at the trial, but, in a *general way*, it is stated that the exceptions noted in the depositions were relied upon.

2. SAME. *Same.*

Exceptions to evidence made on the taking of depositions are not preserved by a sweeping general statement in the record that they were relied upon at the trial, but the particular exceptions insisted upon must be specifically and definitely pointed out in the record.

3. NEGLIGENCE. *Charging comparative negligence.*

Charge of Court embodying doctrine of comparative negligence is erroneous in this State. And comparative, not contributory, negligence is defined where the jury are instructed to decide against the party guilty of the "greater" or "grosser" negligence, without the qualification that the negligence must have been the "prime, principal, and proximate cause of the injury."

Case cited and approved: Railroad v. Hull, 88 Tenn., 33.

Cited and distinguished: Railroad v. Gurley, 12 Lea, 55, 56; Railroad v. Fain, 12 Lea, 35.

4. MASTER AND SERVANT. *Master's duty with reference to machinery.*

Railway company, having a machine-shop, as between itself and employees therein, is not bound to provide machinery that is safe and

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sound so "far as human foresight and skill can make it," but is held to the exercise of only "ordinary care and prudence" in that regard. Cases cited and distinguished: *Railroad v. Elliott*, 1 Cold., 611; *Railroad v. Jones*, 9 Heis., 27-41; 100 U. S., 213-226.

FROM BRADLEY.

Appeal in error from Circuit Court of Bradley County. ARTHUR TRAYNOR, J.

W. M. BAXTER, MAYFIELD & SON, and ROBERT PRITCHARD for Railway Company.

S. P. & D. A. GAUT, and CREED F. BATES for Aiken.

SNODGRASS, J. The defendant in error sued the East Tennessee, Virginia and Georgia Railway Company for damages for killing his intestate son, and recovered judgment for \$2,500 upon the verdict of a jury.

The company appealed, and assigned errors. The first relates to the admission of incompetent testimony respecting a notice which the company had posted in its shop (where plaintiff's intestate was killed), forbidding employes to give intelligence of accidents on the road or in the shop. Such questions were propounded to two witnesses. The

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record shows exceptions in the following form: "Question excepted to by defendant's counsel." On this there was no ruling of the Master before whom the witnesses were being examined, nor by the Court afterward in specific terms; nor is there anywhere an exception to the answers made by the witnesses, which were that such notice related to accidents on the *road*; but in the bill of exceptions taken at time of trial there is a recitation that defendant excepted to the reading of such parts of the depositions taken by plaintiff as were heretofore excepted to and noted in said depositions, and that these exceptions were overruled.

We hold this insufficient to raise any question. Technically there was no exception to the "testimony taken." In the instances referred to there was no objection made to the answers as given—the testimony taken—in answer to the questions stated. But, this aside, there was no specific exception to the evidence, and a mere line in a bill of exceptions cannot be made to do the service of showing specific objections to all the depositions which may have been taken, and thus referred to in general terms.

Such exceptions as are insisted upon must be definitely referred to and set out, so that they may appear to have had the special consideration of the Court; and no sweeping statement of wholesale disposition of them will be treated as the equivalent of such action. Otherwise, the labor and trouble and the accuracy of specific objection

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and action would be dispensed with below by the use of a drag-net to collect them here and apply at convenience.

The second assignment relates to the refusal of the Court to withdraw certain evidence from the jury. It is not well taken, and need be no further noticed.

The third is upon the charge of the Court in telling the jury that plaintiff could recover if defendant was guilty of a greater degree of negligence than deceased, and that defendant's machinery must have been "safe so far as human foresight and skill can make it."

These objections to the charge are both well taken. It has been repeatedly held by this Court that the responsibility of one party and non-responsibility of another for an injury could not be determined by a mere comparison of negligence; that this was too uncertain and unlimited a field in which to turn a judicial inquiry; that to say to juries you may give damages if you think the defendant has been guilty of more negligence than the person injured is practically to do away with all limitations upon them, and allow verdicts uncontrolled by fixed rules of law, making them instead depend upon the mere speculation of juries in uncertain and indefinite comparison.

Where these words have been used implying a comparison beyond the point of equal culpability, they have been followed by the qualification that the "greater" or "grosser" negligence must have

been the "prime, principal, and proximate cause of the injury," and upon this qualification alone held not to state the doctrine of comparative negligence or be reversible error. *Railroad v. Gurley*, 12 Lea, 55, 56, quoting also the exact language of the charge in *Railroad v. Fain*, in same book. Other cases, reported and unreported, have made the same distinction; and no case has been affirmed where the liability has been made to depend upon a mere comparison of negligence without such qualification.

But the question need not be restated or discussed here. At the last term the exact question upon a like charge now being considered was presented, and it was decided to be reversible error to instruct the jury that defendant would be liable if the injury was occasioned by its greater or grosser negligence without qualification respecting the proximate cause. *Railroad Company v. Hull*, 4 Pickle, 33.

In this case it was said that the safer and better rule is to leave off these words, and to instruct the jury that if the negligence of the injured party was not the direct and proximate cause of the injury, but was remote, and that of defendant was the prime, principal, and proximate cause of the injury, the plaintiff might recover; but they, as we have seen, will not be held to vitiate a verdict if accompanied with the qualification stated, and thus limited to a fixed use and meaning. It is true, of course, as a matter of fact,

that a negligence which proximately causes a thing is greater than one which remotely contributes to it; so that if a jury be told that the negligence which causes an injury must be greater and must proximately contribute to the injury in order to make defendant liable, this is but equivalent to stating the proposition that defendant's negligence must have been the prime, principal, and proximate cause of the injury, and that of the person injured not such cause. Hence, the use of these words has not been held to be error where the qualification respecting proximate cause has been added to them. But it is manifest that to omit such qualification and submit the question of comparison without it, makes the result depend not necessarily upon what was the proximate cause of the injury, but upon the opinion of the jury as to which party was more negligent, whether that did or did not immediately and proximately cause the injury.

There was no such qualification in the charge before us. It is precisely such a charge as that quoted in the opinion in the Hull case and held to be reversible, and is of course erroneous.

It was also error to instruct the jury that the machinery in defendant's machine-shop, where plaintiff's intestate was working when killed, must have been "safe so far as human foresight and skill can make it." This is a rule applicable between an injured passenger and a railroad company as carrier of passengers, in suits for injuries sus-

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tained by the passenger in consequence of defective road or machinery used thereon, in which it is universally agreed a higher degree of care is required than as between itself and employes on its trains. In the latter case (as to degree of care required toward employes on its trains), in view of the immense dangers encountered as the result of the slightest want of care on the part of the railroad company, while declaring that "ordinary care" is the rule, this Court has justified charges requiring the very highest degree of care in cases where train employes were injured by defective machinery, and has said that it sees no sound reason for the distinction in liability of the company toward passengers and employes on its trains. *Railroad Co. v. Elliott*, 1 Cold., 611; *Railroad Co. v. Jones*, 9 Heis., 27-41.

This, doubtless, upon the theory that the machinery used is so complicated and powerful and so dangerous that the "ordinary care" of a prudent man in the purchase and preservation of such machinery would be and should be extreme, because, while less care in less danger would be ordinary, only the greatest care where the danger is so great would be ordinary. But be this as it may, there is no doubt that the great weight of authority is with the proposition announced, that the care must be ordinary and does not go to the extent implied in its application by our Court in the cases cited respecting *train employes*. *Hough v. T. & P. Railroad Co.*, 100 U. S., 213-226 (Lawyer's

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Ed., Book 25, page 618); Woods' Railway Law, Vol. 3, Sec. 373; Cooley on Torts, 556, 557.

Here, however, we have no such case. The deceased was not running or working on the trains of the company. He was an employe in its machine-shop, and the mere fact that the defendant company was also the owner of a railroad which it operated, and was sued as such in its corporate name, does not fix upon it a different or higher degree of liability than that of other machine owners toward their employes in shop-work. In this aspect there is no diversity of opinion or room for controversy. The rule is that the machinery employed must be safe and sound as ordinary care and prudence can have it, and not "as human foresight and skill can make it," because this implies the highest degree of care.

It is needless to cite authorities to this proposition, as they can be found collected in all text-books on the relations of master and servant.

The judgment must be reversed and case remanded for a new trial. The cost of this Court will be paid by defendant in error.

Luttrell v. Knox County.

LUTTRELL v. KNOX COUNTY.

(Knoxville. October 11, 1890.)

1. TAXATION. *Bridge erected by lessee upon exempt piers taxable.*

Knox County, having stone piers and right of way suitable for bridge over Tennessee River, leased them to Saulpaw upon condition that he should erect a bridge thereon, "as long as he or his heirs or assigns shall keep the same sound, safe, and in good repair," as required by the lease. These piers and the right of way were exempt from taxation as public property. This lease contained covenants for quiet enjoyment and against incumbrances. It provided that loss of bridge by fire or wind should fall upon lessee; that he should be entitled to all insurance money; that county should not be partner with lessee; and that toll-money should be applied (1) to expenses; (2) for payment to lessee of six per cent. interest on \$50,000—cost of bridge; (3) to payment of \$1,500 to county; (4) the surplus—one-third to county and two-thirds to lessee.

Held: The superstructure erected pursuant to this lease is not exempt, but subject to taxation during the continuance of the lease as the property of the lessee or his assignee.

Case cited and approved: 82 N. Y.

2. SAME. *Same. County not liable to refund taxes to lessee.*

And the county is not liable under this lease to indemnify lessee against the taxes he may be required to pay.

3. SAME. *Same. Navigability of river immaterial.*

The navigability of the river is wholly immaterial upon the question of the taxability of this superstructure.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. R. GIBSON, Ch.

Luttrell v. Knox County.

LEWIS TILLMAN for Luttrell.

WAT M. COCKE and LINK HOUK for County.

LEA, J. The bill in this cause was filed to enjoin the assessment and collection of taxes upon a toll-bridge over the Tennessee River. Complainant insists that the bridge cannot be assessed for taxes because of the interest of the county therein, and that, if the bridge is subject to assessment, under the contract the county must pay the taxes. The Chancellor dismissed the bill, and complainant has appealed and assigned errors. The liability of complainant is to be determined from the contract entered into between the county and Saulpaw, complainant's assignor. The county having stone piers in and on each side of the river, entered into a contract with Saulpaw that the county "doth hereby let and lease to said second party (upon the conditions and for the terms hereinafter specified) the stone piers heretofore erected and now standing on either side and in the Tennessee River, at Knoxville, down to and across said river, * * * together with land owned by said first party, upon which said piers stand, and all the rights of way and approaches to said piers and the bridge to be erected on said piers, and all land, rights, or franchises of every description which said first party has in and to said piers, approaches, and rights of way; to have and to hold the said lands, piers, approaches, and rights of way privi-

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leges unto said Saulpaw, his heirs and assigns, upon condition he erect a bridge upon said piers, and as long as he or his heirs or assigns shall keep the same sound, safe, and in good repair, as hereinafter provided and by him undertaken. And the party of the first part doth covenant that it is lawfully seized of the grounds, piers, properties, rights, privileges, and franchises above leased, and that the same are unincumbered; and it will and does bind itself to defend and protect the said Saulpaw, his heirs and assigns, in the peaceable possession and enjoyment of all said properties and rights, and against the claims of all persons whatever, so long as he or his said heirs or assigns shall comply with the obligations and undertakings by him hereinafter assumed."

The contract then stipulates the character of bridge to be built; and if blown down or burned the loss is to be Saulpaw's, and he is entitled to any insurance there may be on the property. Saulpaw is to collect tolls, out of which is to be paid (1) reasonable expense for management and repairs, including premiums for insurance; (2) six per cent. per annum on \$50,000, the estimated cost of the bridge, to Saulpaw or his heirs or assigns; (3) then, out of the surplus, if any, \$1,500 to the county; (4) if there still be a surplus, two-thirds to Saulpaw, his heirs or assigns, and one-third to the county.

It is then provided that "nothing herein shall be construed as constituting the county of Knox

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a partner with said Saulpaw in said enterprise, or to render said county liable for any contracts or damages that may be made or arise out of or concerning the said bridge, or construction or operation thereof."

The contract was executed in 1880, and Saulpaw thereupon went forward and built the bridge as required by said contract, and assigned the same to complainant, who now collects tolls. The complainant has paid the taxes for several years, as alleged, upon the superstructure, and seeks to recover the same from the county under the contract, because not liable for taxes. It is insisted that the bridge, being erected upon piers belonging to the county, is exempt from taxation. By the terms of the contract the county "doth let and lease to said second party the piers, together with the land upon which said piers stand, and all the rights of way and approaches to said piers, and all rights or franchises of every description; to have and to hold the same to the lessee *as long* as he shall keep the same safe, sound, and in good repair."

The question presented and to be determined is whether by the contract the complainant has such an interest in the superstructure as the law will regard as property, and to the possession and enjoyment of which he is lawfully entitled. Complainant is now in possession of the property. It was built for his own profit under an indefinite lease, and he is entitled to retain possession so

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long as he shall keep the bridge safe, sound, and in good repair. That the lease may be forfeited by the act of the lessee cannot affect the status of the property as to its present ownership. That the piers are exempt from taxation makes no difference as to the ownership of the superstructure. The superstructure upon exempt piers or upon exempt soil may nevertheless by contract be subject to taxation. Cooley on Taxation, 366, 367.

This question was directly decided by the Court of Appeals of New York in the case of *Elevated Road v. Board of Assessors*, 82 N. Y. The foundations, columns, and superstructure of an elevated railroad upon the streets of the city were held to be taxable real estate, and that was so although by the contract the city was to receive a certain stipulated part of the profits arising from operating the road. The fact that the bridge is over a navigable stream can make no difference. That the public have rights of navigation for commercial purposes does not affect the ownership of the bridge. We hold that the superstructure is liable to assessment for taxation. But it is insisted that if liable for assessment for taxes, that under and by the contract the county of Knox is bound "to keep off the taxes." The contract provides that the county "will and does bind itself to defend and protect the said Saulpaw in the peaceable possession and enjoyment of all said properties and rights, and against the claims of all persons whatever." The covenant is simply of peaceable pos-

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session of said property, and not of exemption from taxation. Nothing is said in the contract about taxes, and the proof shows that nothing was said about taxes at the time of the execution. If the county had intended to make itself liable for taxes assessed against the complainant as the owner of the bridge, it would not have been left to inference.

It follows that the decree of the Chancery Court dismissing complainant's bill is affirmed, and complainant will pay the costs.

Judges Lurton and Snodgrass dissent.

ROANE COUNTY v. ANDERSON COUNTY.

(Knoxville. October 11, 1890.)

1. COUNTY. *Reduction of area below constitutional minimum not allowed.*

Reduction of the area of an old county below the constitutional minimum of five hundred square miles cannot be effected either by act of the Legislature or, *a fortiori*, of the County Court.

Constitution construed: Art. X., § 4.

Act construed: Acts 1889, Ch. 34.

Case cited and approved: Marion County v. Grundy County, 5 Sneed, 490.

2. SAME. *Same. Legislative power to restore lost territory.*

But the Legislature has the power to restore to a county territory which it may have lost by its laches and long acquiescence in the claim and possession thereof by another county, and for that purpose to detach that territory from the latter county although the area be thereby reduced below the constitutional minimum.

3. SAME. *Loss of territory by laches.*

A county cannot, without express legislative permission, maintain suit, on account of its laches, to recover territory—part of its ancient domain—where, with full knowledge of its rights, it has acquiesced in the assertion and exercise of ownership and jurisdiction over that territory by another county for a long period of time. Eighteen and fifty years' acquiescence have been respectively held sufficient to defeat the county's claim.

4. BOUNDARY. *Call for line controls call for course.*

Call for course yields to call to run with a designated line, even if the line is unsurveyed, provided it is susceptible of definite location.

5. SAME. *Long acquiescence in line has great weight.*

In the ascertainment of the location of ancient lines, long acquiescence of the parties interested in the location of a line at a particular place

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should have great if not controlling weight, where there are no existing marks or living witnesses to show original location, and the calls and tradition are themselves vague and indefinite. County lines are subject to this rule.

FROM ROANE.

Appeal from Chancery Court of Roane County.
H. R. GIBSON, Ch.

JAMES SEVIER, SAM EPPS YOUNG, and E. E.
YOUNG for Roane County.

D. K. YOUNG, J. A. FOWLER, and C. J. SAWYERS
for Anderson County.

LURTON, J. By an Act passed February 27, 1889, the line between Roane and Anderson Counties was so changed as to detach from Roane about 355 acres, upon which is located much of the new town of Oliver Springs. Roane County having an area of less than 500 square miles, filed this bill to restrain Anderson County from exercising the functions of local government over the territory thus annexed, upon the ground that the change of line operated to further reduce the area of the county, and that under the Constitution of the State this could not be done. Anderson County concedes that the area of Roane cannot, under the

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Constitution, be reduced by any legislation, but insists that the territory in dispute was in law and fact within the ancient and constitutional limits of Anderson County, and that the Act is valid at least to the extent that the territory declared by the Act to be within Anderson County was in fact a part of the ancient domain of that county.

By cross-bill it insists that along a part of the line between the counties there has been a strip claimed by both, and by the cross-bill it seeks to ascertain the true boundary between the counties, not only within the territory embraced in the Act of 1889, but the true line from Walden's Ridge to the double spring, and that this true line be declared the present line between the counties.

Roane County, both in the original bill and in the answer to the cross-bill, denies any doubt as to the true line, and insists that the line between them runs from a point on Walden's Ridge east of the eastern of two gaps in the ridge, then south 19° east to the double springs. She insists that this is the ancient and constitutional line at the point in dispute, and that from time beyond which the memory of man runs not to the contrary, it has been recognized as the line, and that it has exercised control and jurisdiction up to this line, and that the territory placed in Anderson by the Act of 1889 lies west of this true line, thus reducing its area. Whether this line, thus claimed to have been the ancient and legal line, was in

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law and fact the line originally established, it insists is now unimportant, for the reason that the long acquiescence of Anderson in this as the true line has operated by estoppel and laches to prevent Anderson from now asserting the contrary.

Both these counties were created by the Act of 1801. This Act describes the western line of Anderson at the point in dispute as follows: Beginning at a point in the northern boundary of the State, "thence south 45° west to a point from whence south 45° east will strike Walden's Ridge one quarter of a mile above the gap of the Indian Fork of Poplar Creek, thence to the double springs on the east fork of said creek."

The very next section establishes Roane County, and the call for its eastern line is as follows: Beginning at the north-east corner of Anderson County, "thence along said line north 45° west to the north-west corner thereof." The call here quoted, calling for course north 45° west, must be subordinated to the direction to run "*with the line*" of Anderson. Anderson had not been surveyed, and its western line, as will be seen by the recitation already made, did not at the point in dispute run north 45° west. To run the eastern line of Roane according to this call for course would not follow the line of Anderson, and would leave a strip between the counties belonging to neither county. It follows that we can only locate the eastern line of Roane by first locating the western line of Anderson.

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By the Act establishing these counties, Jesse Roysden was appointed a commissioner upon the part of Anderson County to survey and establish the line between it and Roane, and a commissioner was likewise appointed to represent Roane. No record of this survey can be found, and there is no satisfactory evidence of any line or corners marked by him. That Roysden did survey the line is established by the fact that in 1807 an Act was passed adopting the line surveyed by him as the line between Anderson and Roane. Unfortunately this Act gives none of the calls or courses of this line thus adopted. In the absence of any marked line, or of the calls and courses of the line surveyed by Roysden and adopted by the Legislature as the true line, we are compelled to resort to the indefinite calls in the Act of 1801, and to secondary evidence as to where the line ran as surveyed by the legislative commissioners. There are two gaps in Walden's Ridge near the point where all agree the corner of the counties should be. The natural object called the "double springs" is a point well known. The trouble arises from the indefiniteness of the call for a point "one-fourth of a mile above the gap of Indian Fork of Poplar Creek." A small stream flows through each of the two gaps, which unite within a quarter of a mile of a point south of the gaps. From the junction of these two streams there is no doubt but that the stream is identified as the stream called for in the Act. But above

the junction of the two forks there is great doubt on the evidence as to which was known in 1801 as the Indian Fork. The weight of evidence is that at present, and for many years, the eastern of these forks has been locally known as Cow Creek, and that the western is now known as Indian Fork. The proof from old entries, made at about the time and shortly after the passage of the Act of 1801, would seem rather to indicate that these streams were then known as the Western and Eastern Forks of the Indian Fork. These forks make their way through Walden's Ridge within a quarter of a mile of each other. They are separated by a hill 250 feet above the level of the streams. But the hill itself is very much lower than the top of the ridge upon the east and west of the general depression. Which of these two contiguous gaps was known as the gap of the Indian Fork in 1801 is extremely doubtful. When we consider the fact that the whole region was unsettled, and that the Indians were within a few miles of this region, it is very probable that the general depression through which these two small creeks flowed was known as the gap of Indian Fork. Another difficulty in the location of the line on Walden's Ridge arises from the fact that the point near the gap from which the line is to run direct to double springs is a point designated as "one quarter of a mile *above* the gap of the Indian Fork of Poplar Creek." By calling for a point "*above*" the gap, did the Legislature

use the word "above" with reference to the stream or the range of mountains called Walden's Ridge, or was it used with general reference to the north as being above? Very plausible arguments have been made in favor of each of these views. We are unable to come to any satisfactory conclusion with reference to the meaning attached to this word. We get, upon the whole, little, if any, assistance in settling the true corner near this gap from the terms of the Act establishing these counties.

We turn from the Act of 1801 to a vast mass of hearsay evidence as to where this line near the gap is said to have been located. Here again there is much confusion. Many witnesses testify to declarations made by old settlers near the gap, now deceased, who declared the line to begin on a walnut in the western gap, and to run thence to the double springs. Equally as many testify to declarations, in many cases from the same residents, that the corner was upon the ridge and east of the eastern of the two gaps. The greater weight attaches to the latter class of witnesses. We reach this conclusion for two reasons: (1) Because a line beginning in the western of the two gaps would entirely ignore the call in the enabling Act, which located the call one-quarter of a mile "above" the gap. Any construction that might be adopted would not begin the line to the double springs in either of the gaps. (2) Among the witnesses who testify to declarations of de-

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ceased residents along the disputed line are sons and grandsons of the very earliest settlers near the gap, and these, for the most part, say that their ancestors claimed the line to begin on the ridge east of the eastern gap. The witnesses to the contrary view were unconnected with the deceased declarants, and many of them were only occasionally at the gap.

The means of information possessed by the witnesses who speak of their own understanding of the location of this line is favorable to the contention of Roane County. In support of this hearsay and opinion evidence, there remains the very powerful fact that notwithstanding there has been among the residents of this locality some difference of opinion as to where the true legal line was, the county of Roane has at all times, up to the passage of the Act of 1889, claimed and exercised governmental jurisdiction up to the line beginning east of the eastern gap. Whatever claims have been advanced favorable to the contention of Anderson, by either the county or its officers, have been sporadic and ineffective.

Steadily and persistently the jurisdiction of Roane over the disputed territory has been asserted and exercised. In this the county of Anderson has, with some discontent at times, acquiesced. The legal claim of the county has never been asserted, and for half a century it has accepted the line as claimed by Roane to be the true legal line. In a case decided at September Term, 1888, between

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the counties of Roane and Loudon, we dismissed a bill in equity filed by Roane County to recover territory which had been detached by an Act of the Legislature and added to the county of Loudon. The Act was void as having reduced Roane below its constitutional area. But Roane had acquiesced in the Act for about eighteen years, and we held, on the facts, that by reason of laches in asserting title, a Court of Equity ought not to entertain so stale a claim. This principle is applicable to Anderson County, so far as by its cross-bill it seeks to assert title to territory not embraced within the Annexation Act of 1889. It is not applicable so far as the disputed territory is declared to be within its boundary. The Act has accomplished what could not have been attained by litigation. Laches would have repelled a suit, the Courts simply refusing to hear a stale demand.

Having recovered territory by an Act of legislation, it is, as to such territory, seeking no affirmative relief. Laches would not operate to bar a defense to a suit seeking to recover territory annexed by an Act of legislative power. So that, if Anderson County can show that the territory annexed by this Act was anciently within its domain, and has been unlawfully and without authority of law claimed and controlled by Roane, the defense will be effective, for laches has not operated to defeat the legal right, but had deprived it of legal remedy.

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But while laches is no bar to the defense, yet it becomes, in a case like this, of very great weight in determining the truth of the claim now asserted as to the true line.

The evidential value of long acquiescence in a particular line as the true line is not lost because it does not amount to an estoppel, or because it is inoperative as laches.

The fact that Roane County has persistently exercised jurisdiction over this territory, and that Anderson County has submitted without an appeal to the Courts of the country, becomes a very weighty fact as evidence of the true line.

We therefore conclude that upon the whole proof the weight of evidence is that the line between Roane and Anderson begins at the point on Walden's Ridge fixed by the decree of the Chancellor as east of the eastern gap, and that it runs thence by a line south 19° east to the double springs. It follows that the Act of 1889 operates to detach from Roane County territory which was at the time within the boundary of that county. The Act is void and unconstitutional, inasmuch as the area of the county was less than 500 square miles. *Marion County v. Grundy County*, 5 Sneed, 490.

We have not deemed it necessary to discuss the effect of the line run by commissioners from the two counties in 1887. The survey was not accepted by Roane County. If it had been, it would not have been valid, as it would have

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operated to reduce the area of the county. What the Legislature could not constitutionally do, the County Court of Roane could not by its act or consent accomplish.

Affirm the decree.

Hurst v. Wilson.

HURST v. WILSON.

(Knoxville. October 14, 1890.)

1. RULE IN SHELLEY'S CASE. *History and statement of rule in Tennessee.*

Before its repeal by Acts 1851-52 (Code, §2814 M. & V.) the rule in Shelley's case was in force in Tennessee, and is thus stated by our Courts: "Whenever the ancestor by any gift or conveyance takes an estate of freehold in lands or tenements, and in the same gift or conveyance an estate is afterwards limited by way of remainder to his heirs, or to the heirs of his body, the words 'heirs' or 'heirs of the body' are words of limitation of the estate carrying the inheritance to the ancestor, and not words of purchase creating a contingent remainder in the heirs." This rule is "not merely a rule of construction, but one of imperative obligation."

Act construed: Acts 1851-52, Ch. 91 (Code, §2814 (M. & V.); §2008 (T. & S.).

Cases cited and approved: *Williams v. Williams*, 11 Lea, 652; *Polk v. Faris*, 9 Ver., 209; *Cooper v. Coursey*, 2 Cold., 416; *Woodrum v. Kirkpatrick*, 2 Swan, 224.

2. SAME. *Example of will that falls within this rule.*

The devise falls within the rule in Shelley's case, and vests an estate in fee in the first taker, where the testator died in 1844, leaving a will containing this provision: "I will and bequeath to my son, Russell Hurst, my Cate tract of land during his life-time, and at his death I desire the same to go to the heirs of said Russell; and in consideration thereof he is to pay a debt I am owing the bank for said tract of land."

FROM M'MINN.

Appeal from Chancery Court of McMinn County.
W. H. DEWITT, Sp. Ch.

Hurst v. Wilson.

W. L. HARBISON for Hurst.

BURKETT, MANSFIELD & TURLEY, SAM EPPS YOUNG,
DAVID C. YOUNG, and C. D. CLARK for Wilson.

LURTON, J. Elijah Hurst died in 1844, leaving a will, the fourth clause of which is as follows: "I will and bequeath to my son, Russell Hurst, my Cate tract of land during his life-time, and at his death I desire the same to go to the heirs of said Russell; and in consideration thereof he is to pay a debt I am owing the bank for said tract of land." This land was sold and conveyed in fee by Russell Hurst to the ancestor of defendants. Russell Hurst having lately died intestate, complainants, who are his children, or the representatives of children, bring this bill to recover as remainder-men under the will of Elijah Hurst. The defendants have demurred, upon the ground that under the will Russell Hurst took the absolute fee.

The question is governed by the rule in Shelly's case. The Act of 1851-52, repealing the rule in this State, was subsequent to the death of the testator, and the will must be therefore construed by the law as in force before the repeal of the rule in Shelly's case. *Williams v. Williams*, 11 Lea, 652.

That the rule in Shelly's case was law in this State before our Act of 1851-52, is well settled. *Polk v. Faris*, 9 Yer., 209; *Cooper v. Coursey*, 2 Cold., 416.

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This rule was, as has been observed by Mr. Washburn in his work upon real estate, "not merely a rule of construction, but one of imperative obligation."

Every circumstance necessary to concur in order to bring into operation this rule of property is found in this will. Under it an estate for life, which is a freehold estate, is vested in the ancestor of complainants. By the same assurance the remainder is limited to the "*heirs*" of the first taker. The estate devised to each is of the same quality, both estates being legal estates. The rule as stated by this Court is this: "Whenever the ancestor by any gift or conveyance takes an estate of freehold in lands or tenements, and in the same gift or conveyance an estate is afterwards limited by way of remainder to his heirs, or to the heirs of his body, the words '*heirs*' or '*heirs of the body*' are words of limitation of the estate carrying the inheritance to the ancestor, and not words of purchase creating a contingent remainder in the heirs." 9 Yer., 209.

There is nothing favorable to the complainants in the fact that the testator charges the devisee with the payment of purchase-money due for the land. This does not convert it into a bargain and sale, and is the ordinary method of charging a devise or a legacy with a burden in favor of another. This circumstance, if of any weight, would rather tend to show that the testator intended to devise an estate in fee to his son rather

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than a mere estate for life. The case is governed by *Polk v. Faris*, 9 Yer., 210; *Woodrum v. Kirkpatrick*, 2 Swan, 224, and *Williams v. Williams*, 11 Lea, 652. We see nothing to justify us in taking it out of the well-settled law as administered before the abolition by statute of the ancient rule laid down in *Shelly's* case.

Russell Hurst took an estate in fee, and his deed operated to pass the fee to his vendee, the ancestor of defendants.

The decree overruling the demurrer must be reversed, the demurrer sustained, and the bill dismissed with costs.

 Raht v. Meek.

RAHT v. MEEK.

(Knoxville. October 16, 1890.)

 1. ADMINISTRATION. *Sale of land to pay debts. Statute of limitations.*

Proceedings to sell decedent's lands to pay debts are not barred, though instituted more than seven years after his death, if brought within that period after the creditor, acting with due diligence, has obtained judgment against the personal representative.

Code construed: §§ 3119, 3483 (M. & V.); §§ 2281, 2786 (T. & S.).

Case cited and approved: *Henry v. Mills*, 1 Lea, 144.

(See also 1 Lea, 135; 16 Lea, 349.)

 2. SAME. *Same. Void sale. Parties.*

Administration sale of decedent's lands to pay his debts is void, and confers no title upon a purchaser thereat, when made under proceedings against the heir commenced after he had conveyed his interest in the lands descended to a purchaser who was not made a party, and whose deed had been duly registered.

 3. SAME. *Same. Effect of heir's conveyance.*

The purchaser of descended lands from the heir acquires a good and indefeasible title against all persons except the ancestor's creditors, and as to them also if the purchase was *bona fide*. In suit by ancestor's creditors against the heir's vendee to subject such lands to debts, the burden is upon the latter to show *bona fides* of his purchase.

Code construed: §§ 2435, 3094 (M. & V.); §§ 1765, 2256 (T. & S.).

Case cited and approved: *Gibson v. Jones*, 13 Lea, 692.

(See also *Smith v. Thomas*, 14 Lea, 324.)

 FROM POLK.

Appeal from Chancery Court of Polk County.
 W. H. DEWITT, Sp. Ch.

Raht v. Meek.

P. B. MAYFIELD & SON for Raht.

L. A. GRATZ for Meek.

LURTON, J. Complainants claim title to an undivided one-twenty-fourth interest in a tract of land in Polk County under a deed made by A. P. Caldwell to their ancestor, Julius Raht. A. P. Caldwell claimed title as an heir at law of John Caldwell, who died intestate, leaving eight children, one of whom was the vendor.

John Caldwell died October 20, 1869, and at the time of his death was the owner of an undivided one-third interest in this Polk County land. October 20, 1876, just seven years after the death of John Caldwell, his son, A. P. Caldwell, sold and conveyed to Julius Raht, for the recited consideration of one thousand dollars, his one-eighth interest as one of his father's heirs in this Polk County land. In March, 1877, being after this alienation by the heir, a bill was filed in the Chancery Court of Polk County against all of the heirs of John Caldwell, including A. P. Caldwell, by creditors of the intestate, who had in 1872 recovered judgments against the administrator, to sell the undivided interest of the intestate to pay debts of the estate. The deed from A. P. Caldwell to Julius Raht had been theretofore duly recorded, but this alienation of the share of one of the heirs of the intestate was ignored, and Julius Raht was not made a party to this creditor's bill. Under

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this bill such proceedings were had as resulted, in 1882, in a sale of the entire one-third interest of the intestate, including the one-eighth share of A. P. Caldwell therein. At this sale Defendant Meek became the purchaser. Although this proceeding to reach the land of the heirs to satisfy debts of the ancestor was begun more than seven years after descent cast, yet it was in time, having been begun within seven years after judgment against the administrator. *Mills v. Henry*, 1 Lea, 144.

This bill is filed by complainants, who are devisees of Julius Raht, to cancel the decree and deed under which Defendant Meek claims as a cloud upon their title to the one undivided one-eighth interest of A. P. Caldwell.

This alienation by the heir was previous to the beginning of any suit to subject the lands of the intestate to the satisfaction of debts due by the intestate. The lands of an intestate descend to the heir. They are assets only *sub modo*, and cannot be subjected by the creditor in the heir's hands until it is shown that the personalty has been exhausted in the payment of debts. Lands *bona fide* aliened by the heir before the bringing of a suit to subject the land to payment of debts are not liable to the creditor, but the heir in such case is answerable to the creditor for the value of the land aliened. Code, §§ 1763, 1764, 2256.

The purchaser from the heir will, as against the creditor of the intestate, acquire a good and

indefeasible title, provided he is a *bona fide* purchaser, but the burden is upon him, when the creditor seeks to subject such land, to show that his purchase was in good faith. This we regard as settled by the case of *Gibson v. Jones*, 13 Lea, 692.

The registered deed of the heir operated to convey the legal title to his vendee. This could only be defeated by the suit of a creditor to which the alienee was a party. Such a vendee had a right to show, if he could, that the personalty had not been exhausted, or that he was a *bona fide* purchaser. Obviously his title cannot be affected by a suit against the heir alone. The proceeding under which defendant claims to have acquired the title of A. P. Caldwell was void so far as it affected the interest previously conveyed to Julius Raht. It is immaterial now to inquire whether this alienation was *bona fide*. This inquiry would only be relevant in a suit by a creditor to subject alienated lands. The defendant is not such a creditor, and his title must stand or fall upon the validity of a title acquired under a proceeding to which the alienee of the heir was not a party. The alienee of the heir is not bound by such a decree, and the title of the purchaser under such a decree is invalid in so far as there had been a previous registered alienation by the heir.

Affirm the decree, with costs.

State, *ex rel.*, v. Lookout Bank.

STATE, *ex rel.*, v. LOOKOUT BANK.

(*Knoxville*. October 20, 1890.)

1. BANKS. *Incorporated banks are not embraced by Act of 1859-60, Ch. 129.*

Incorporated banks are not embraced by the provisions of the Act of 1859-60, Ch. 129, entitled, "An Act to encourage the use of private capital," and therefore are not liable for the penalty therein imposed for taking usury in violation of that statute. That Act applies alone to "persons and partnerships, and associations of persons paying taxes for the use of money as money-lenders." It does not include corporations.

Act construed: Act of 1859-60, Ch. 129.

Code, §§ 2486-2488 (M. & V.); §§ 1829*f* (T. & S.).

2. SAME. *Purpose of Act of 1859-60, Ch. 129.*

Private, unchartered banking was prohibited absolutely by Act of 1827, Ch. 85 (Cor. & Nich., p. 121). This prohibition had been so far relaxed prior to the Act of 1859-60, Ch. 129, as to allow "discounting securities for money and shaving notes" upon payment of a license tax. (Code, § 550, subsec. 9 (T. & S.). The purpose of the Act of 1859-60 was to further modify the Act of 1827, and to practically restore the right of private banking as it had existed prior to 1827.

Cases cited: *Insurance Company v. Insurance Company*, 11 Hum., 23; *Hazen v. Bank*, 1 Sneed, 119.

FROM HAMBLEN.

Appeal in error from Circuit Court of Hamblen
County. W. R. HICKS, J.

State, *ex rel.*, v. Lookout Bank.

THOMAS CURTIN for Relator.

JAMES G. ROSE for Bank.

LEA, J. This is a *qui tam action* to recover a penalty of \$500 for alleged usury. The defendant is sued as an incorporated bank. The suit is based upon §§ 2486, 2487, 2488 of (M. & V.) Code, which is copied from the Act of 1859-60, Ch. 129. The Act is entitled, "An Act to encourage the use of private capital," and the first section is as follows:

"*Be it enacted by the General Assembly of the State of Tennessee*, That hereafter all persons and partnerships, and associations of persons paying taxes for use of money as money-dealers, in accordance with the laws in such cases made and provided, shall be hereafter allowed to receive deposits, issue checks or bills of exchange, or discount notes, bills, or other securities; *Provided*, Such person shall not be allowed to charge on bills a greater discount than legal interest, and the current rate of exchange then existing in favor of the place where the bill is drawn, and against the place upon which it is drawn; *Provided further*, That this Act shall not be construed to authorize such persons, partnerships, or associations to issue and put in circulation any instrument or promise to pay money intended to pass as currency or money; *And provided further*, That no such persons or companies shall be allowed to receive on deposit

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or pay out the note of any bank not chartered by this State, nor shall they pay out any interest on deposits; and for every violation of any one of these provisions, such person, partnership, or association of persons, shall be liable to a penalty of five hundred dollars, recoverable in any Court having jurisdiction thereof, one-fourth to the informer or prosecutor, and the other three-fourths to the State."

The question presented is, Do the provisions of this Act apply to *incorporated banks*? or was it intended to define and regulate the business of *private banking*, or rather of those who pay "taxes for the use of money as money-dealers?" We are of the opinion that the Act was not intended to apply to incorporated banks, for the following reasons:

First.—The caption shows that it applies to natural persons and not to corporations.

Second.—The Act does not mention, or rather omits to include within its provisions, corporations or chartered banks, although there were quite a number of them in the State at the passage of the Act. These banks were regulated by laws found in their charters, or other laws then in force.

Third.—The fact that the persons referred to in the Act are expressly designated as persons "paying taxes for the use of money as money-dealers," indicates that it was purposely meant to exclude banks from the operation of the statute, else the circumlocution to designate to

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whom the Act applies would not have been used.

Fourth.—By the Act such persons, partnerships, and associations “shall be hereafter allowed to receive deposits, issue checks or bills of exchange, or discount notes, bills, or other securities.” This was certainly intended to confer these privileges on some one that did not have them. Incorporated banks had the privileges already, and always had the privileges conferred by the Act. It was manifestly intended to confer these privileges upon the licensed money-dealers, and not upon incorporated banks.

Fifth.—The second proviso in the Act is as follows: “*Provided further*, That this Act shall not be construed to authorize such persons, partnerships, or associations to issue and put in circulation any instrument or promise to pay money intended to pass as currency or money.” This was a prohibition against issuing bills or notes to circulate as money. At that time chartered banks were authorized, under certain restrictions, to issue notes to circulate as money.

Sixth.—The third proviso of the Act prohibits any such persons or companies “to receive on deposit or pay out the notes of any bank not chartered by this State.” This is an express recognition on the face of the Act that chartered banks of this State then had the right to issue notes or bills as money, and that persons, partnerships, and associations provided for in the Act were expressly

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prohibited from issuing any such bills or notes of their own, and only allowed to receive on deposit and pay out the notes of such chartered banks of this State.

Seventh.—At the same session of the Legislature, and only a few days prior to the passage of the Act under consideration, the Legislature of 1859–60 passed an Act entitled “An Act to reform and regulate the business of banking in Tennessee.” This Act was upon the subject of incorporated banks and to regulate the same. Among other things, it authorized incorporated banks to issue circulating notes, to pass as money, and prohibited such banks from paying out any notes except such as were payable at its own counter, or that of its branches. The Act under consideration was passed a few days afterward, entitled “An Act to encourage the use of private capital,” in which persons, partnerships, and associations of persons are prohibited, under the penalty of \$500, from issuing notes at all. The one Act does not and was not intended to repeal the other. The first applied to incorporated banks and the latter to “persons, partnerships, and associations of persons paying taxes for the use of money, as money-dealers,” and not to incorporated banks.

Prior to the Act of 1827 private or unchartered banking was held to be a “common law right; which any person might lawfully exercise.” 11 Hum., 23; 1 Sneed, 119. But the Act of 1827, Ch. 85, absolutely prohibited all private, unchartered

banking, but recognized and permitted chartered banking. Car. & Nich., p. 121. The Act of 1827 was in force until the Act of 1859-60, except so modified as to create and define the privilege of "discounting securities for money, and shaving notes." Code, § 550, subsection 9. The exercise of this privilege required a license and payment of a tax. This was only a partial restoration of the common law right of private banking. It gave no authority to receive deposits, to issue checks, or to buy and sell exchange, all of which are legitimate banking operations. Thus the law stood until the Act of 1859-60, Ch. 129, was passed, and its manifest purpose was to further relax the Act of 1827 and to practically restore the common law right of private banking in the form of a licensed privilege.

The action of the Circuit Judge sustaining the demurrer to plaintiff's declaration is sustained, and his suit is dismissed, with cost.

Boyd v. Johnston.

BOYD v. JOHNSTON.

(Knoxville. October 23, 1890.)

1. ADMINISTRATOR. *Personally liable upon note executed for debt of the estate.*

An administrator is personally liable upon his note executed for a debt of his intestate, although he adds his official designation to his signature.

Case cited and approved: East Tenn. Iron Co. v. Gaskell, 2 Lea, 742.

2. SAME. *Same. Liability limited to assets.*

But the personal liability of the administrator is limited, as between original parties, to the creditor's proper *pro rata* of the assets of the estate, where the administrator, without intending to incur any personal liability, executed the note for his intestate's debt solely upon consideration of the assets, then supposed to be sufficient, but which were in fact insufficient, to pay all debts in full.

Cases cited and approved: 13 Wend., 557; 7 Gratt., 300.

3. SAME. *Same. Burden of proof.*

Presumption of sufficient assets arises from the execution of the note, and the burden is upon the administrator to rebut this presumption by proof. When this presumption is rebutted, then the burden shifts to the payee to show other sufficient consideration for the note.

4. SAME. *Same. Additional consideration.*

The surrender by the creditor of a supposed partner's lien or claim upon the assets of the estate, affords no consideration for extending the administrator's personal liability upon his note beyond the creditor's *pro rata* of those assets, where the evidence fails to show that any distinguishable partnership assets came to the administrator's hands. The partner, in such case, is in no better attitude than general creditors.

FROM MONROE.

Appeal from Chancery Court of Monroe County.
W. H. DEWITT, Sp. Ch.

Boyd v. Johnston.

PRITCHARD, SIZER & THOMAS for Boyd.

H. H. TAYLOR and STEPHENS & HICKS for Johnston.

LURTON, J. This case involves the question of the personal liability of Mrs. Boyd upon a note signed by her as administratrix. The note is in these words:

"\$561.21.

OCTOBER 11, 1882.

"For value received I promise to pay J. F. Johnston, or order, \$561.21 on demand, with interest from date.

"(Signed) LOU R. BOYD, *Adm'x.*"

At the time this note was executed Mrs. Boyd was the administratrix of her husband's estate. A suit having been brought at law against her personally, she has filed this bill in equity to enjoin the action. Defendant has answered, and filed a cross-bill praying a decree against her.

The proof shows that Mrs. Boyd supposed the estate in her hands solvent at the time she gave the note. Subsequently it proved insolvent, and proper steps were taken to settle it as such. The assets in her hands will pay only about fifteen cents on the dollar.

It is doubtless true that she supposed she was incurring no personal liability by the execution of this note; but she has entirely failed to establish that any representation to that effect was made by the payee. There is no principle better settled

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than that an administrator executing a note for a debt due from the intestate binds himself personally, notwithstanding there be added to the signature an official designation. *East Tenn. Iron Co. v. Gaskell*, 2 Lea, 742.

Regardless of any personal consideration, the assets of the estate are a consideration supporting the promise to pay. The fact of the execution of such a note is *prima facie* evidence of assets, because they are the legal consideration upon which the law presumes the note to rest. Therefore, it is not incumbent on the payee to prove assets. This presumption of a consideration may, however, be rebutted between the original parties by the defendant showing that in fact there was a deficiency of assets, and therefore a failure of consideration to support the note. When such deficiency is shown, the liability will be diminished to the extent of such failure of consideration. *The Bank of Troy v. Topping*, 13 Wend., 557; *Snead v. Coleman*, 7 Gratt.; 300; Daniel on Neg. Ins., Sec. 263.

Unless there be some other consideration than the assets of the estate, the decree of the learned Chancellor permitting a recovery only to the extent of assets must be affirmed.

Defendant's counsel, however, insist that the evidence shows that the intestate and Johnston were partners in a large transaction in pork, which was unsettled, and that Johnston, as surviving partner, had a right to wind up this partnership matter,

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and to priority of satisfaction out of the partnership assets in the adjustment of his equity as a partner, and that the surrender of this right of preference after payment of partnership liabilities and of his lien on the assets of the firm, was an additional consideration sufficient to support the note.

If there was any other consideration than a sufficiency of assets, then, as remarked by Judge Moncure in *Snead v. Coleman*, "it is consistent alike with justice and the intention of the parties that the executor should be personally liable for the debt." The presumed sufficiency of assets having been rebutted, the burden is upon the payee to establish some other sufficient consideration of benefit to the maker of such a note, or some detriment or loss arising out of the agreement to the payee. The proof entirely fails to establish that any of the partnership pork was on hand at the death of the intestate. The partnership was in a single lot of pork, and each had in it an undivided half interest.

It was bought in the fall of 1881. Boyd was to hold and sell it on the joint account. Johnston testifies himself that Boyd, before his death, told him that he had shipped all of the partnership pork in his own name. It appears further that Boyd had pork of his own, and that he had so kept his books that it was impossible to distinguish sales of partnership pork from his individual sales. To complicate matters still further, he seems to

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have had some joint pork transactions with one Hoyle. Whether there were any partnership assets in the shape of claims for pork sold and not paid for does not satisfactorily appear. Boyd had told Johnston that a firm in Lynchburg, Va., owed them for pork, but whether this was afterwards collected by Boyd is not shown. A Mr. Hoyle, who, as stated before, was himself interested with Boyd in some pork transactions, seems to have taken charge of Boyd's books showing sales of pork, and to have collected in outstanding claims. Whether he collected any thing on account of sales for Boyd and Johnston is not sufficiently shown. Mr. Johnston himself says that these books were in such condition that it was impossible to ascertain any thing concerning the results of this joint transaction. In consequence of his inability to ascertain any thing about the matter, he proposed that the claim should be adjusted by returning to him the balance of capital he had remaining in the firm, and ten per cent. thereon as an estimate of his share of profits. This was agreed to, and the note involved executed.

That Hoyle paid over to Mrs. Boyd moneys collected by him on sales made by Boyd, does not establish that the fund arose from collections of partnership claims; for, as before stated, Boyd sold the partnership pork in his own name, and made sales on his own account, and on account of himself and Hoyle, all in his own name.

In this condition of affairs, there is not shown

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any partnership assets upon which Johnston could have fastened a lien for the adjustment of his equity as a partner. His claim was nothing more or less than a claim against the intestate for his interest in the partnership assets appropriated to his own use by sales in his own name.

There was not, therefore, any surrender of distinguishable partnership assets to the administratrix, and, therefore, no loss or detriment resulting from his abandonment of any right to, or lien upon, partnership assets. His claim was in no better attitude than the general creditors of the estate, and there was no other consideration for the note than the assets of the estate.

Affirm the decree with costs of this Court against the appellant.

Kenner v. Loyd.

KENNER v. LOYD.

(*Knoxville*. October 23, 1890.)

REDEMPTION OF LAND. *Ineffectual, when.*

Redemption of land by a judgment creditor who has no lien or levy thereon, is wholly ineffectual when the judgment debtor had conveyed the land by registered deed after the original levy, and prior to the sale under that levy.

FROM HAMBLEN.

Appeal from Chancery Court of Hamblen County.
JOHN P. SMITH, Ch.

J. T. & J. K. SHIELDS for Kenner.

JAMES G. ROSE for Loyd.

TURNER, Ch. J. On March 11, 1888, Lookout Bank of Morristown obtained judgment against Daniel J. Taylor for \$2,105.80. An execution therefrom was levied on a tract of land, and on April 1, 1889, a sale was had, the bank becoming the purchaser.

On March 25, 1889, six days before sale under execution, Taylor sold the land to Kenner, who

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agreed to pay off incumbrances in part consideration of the purchase - price. Kenner went into possession, and still holds it.

On March 14, 1890, R. B. Loyd, a judgment creditor of Taylor, redeemed from the bank. William Crosby, also a judgment creditor of Taylor, redeemed from Loyd.

The judgments, except that of the bank, were before Justices of the Peace.

The bill admits the land is subject to the debt of the bank.

The bill seeks to remove any cloud upon the title of Kenner by the redemptions mentioned, charging that no interest or title was acquired thereby.

The Chancellor dismissed the bill. This was error. If at the time of purchase Kenner had paid off the judgment of the bank, its levy would have been relieved, and no lien of any sort would have existed. The Justices' judgments were not liens. So far as appears, no execution ever had been issued. If the bank, then, had been paid, there was nothing to authorize a sale. That levy was the only incumbrance. It is not now denied, but is confessed, that the land is subject to the payment of that debt.

The Justice judgment creditors bear no such relation to the bank creditor as to be in a condition to work out any equity, or establish through it any incumbrance on the land.

The bank judgment out of the way, the mat-

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ter stands with the outstanding Justices' judgments alone, and we know of no rule of law or equity prohibiting a land-owner to sell until such claims have been paid, or making his sale subject to incumbrances because of them.

The decree is reversed, and decree here granting relief prayed.

RAILWAY COMPANY v. TELFORD'S EXECUTORS.

(Knoxville. October 30, 1890.)

1. EMINENT DOMAIN. *Foundation and limit of the power.*

The power to take private property for public use depends upon, and is limited by, the necessities of the public. Hence the absolute fee in land, or its exclusive possession, will not be condemned for a public purpose where a mere easement in, or conjoint occupation of, the land will suffice to meet the necessities of the public.

2. SAME. *Construction of railway charter.*

Railway company constructed road over a tract of land, and operated it continuously for thirty years after completion. It did not condemn or pay for the land taken, and had no contract with the land-owner in reference to right of way. Its charter provided that in absence of any contract with the land-owner "it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used only for the purpose of said road, and no longer, unless the persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her, or them, shall apply for an assessment for value of said land, as hereinbefore directed, within five years next after that part of said road was finished; and, in case the said owners, or those claiming under them, shall not apply for such assessment within five years next after said part was finished, they shall be forever barred from recovering the said land or having any assessment or compensation therefor."

Held: The railway company did not take the absolute fee or exclusive right to possession of the "space of one hundred feet on each side of the center" of its road, but only an easement therein commensurate with its legitimate necessities.

Act construed: Acts of 1847-48, Ch. —, Sec. 23.

Case cited and approved: 68 N. Y., 594.

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3. SAME. *Same. Owner's possession not adverse.*

Subject to this easement of the railway company in the lands taken, the fee and right of possession remain with the owner; and therefore his possession of the land for agricultural purposes is not adverse to the company's rights, so long as the land is not required for railroad purposes, and there is no open assertion of any right hostile to or incompatible with the company's easement therein.

4. SAME. *Same. Right to put in side-track.*

Under the easement acquired by the railway company, it had the right to put in a necessary side-track upon the land taken within thirty yards of the main track thirty years after completion of its road; and the company's right to put in such side-track is not extinguished by the owner's possession of the land upon which it was located for thirty years for agricultural purposes.

Cases cited and approved: 22 Kan., 285 (S. C., 31 Am. Rep., 190); 104 Mass., 1 (S. C., 6 Am. Rep., 181).

5. SAME. *Same. Provision for compensation of land-owner constitutional and exclusive.*

The provisions for compensation of the land-owner contained in this charter are constitutional and exclusive.

Case cited: *Sims v. Railroad*, 12 Heis., 621.

FROM WASHINGTON.

Appeal in error from Circuit Court of Washington County. A. J. BROWN, J.

W. M. BAXTER and KIRKPATRICK & WILLIAMS
for Railway Company.

NEWTON HACKER for Telford's Executors.

Railway Company *v.* Telford's Executors.

LURTON, J. Action for damages for land alleged to have been appropriated by plaintiff in error—the East Tennessee, Virginia and Georgia Railway Company—upon which to construct a siding parallel with main track.

The line of railway operated by appellant was constructed more than thirty years since over the lands of G. W. Telford, and has been continually operated. Very recently the railway company have put in a side-track over the same land, and within thirty feet of the main track. The executors of Telford, in whom is vested the legal title, bring this action as for an additional appropriation. The company defends upon the ground that this additional track has been put upon their own right of way. No conveyance was ever made by Telford of any right of way, and no condemnation had. The railway company claims a right of way of one hundred feet on each side of center of track under the provisions of Section 23 of their charter, which is in these words: "In the absence of any contract with the said company in relation to land through which the said road may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall

have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used only for the purpose of said road, and no longer, unless the persons owning the said land at the time that part of the road which may be on said land was finished, or those claiming under him, her, or them, shall apply for an assessment for the value of said land, as hereinbefore directed, within five years next after that part of said road was finished; and, in case the said owners, or those claiming under them, shall not apply for such assessment within five years next after the said part was finished, they shall be forever barred from recovering the said land or having any assessment or compensation therefor, etc." Act of January 27, 1848.

No action for an assessment of damages was ever brought by Telford, and there is no evidence that he was ever compensated. The constitutionality of this provision for the taking of private lands for a public use cannot be impugned. An ample remedy is given the owner to recover compensation, and this remedy is exclusive. This point has been expressly ruled in a case involving a similar charter. *Simms v. Railroad*, 12 Heis., 621.

Defendants in error insist that the land not actually occupied by the railway track and embankments has been continuously cultivated by Telford since the construction of the road, and that for fifteen years a part has been fenced in.

with his other lands, and that this has been under a claim of right and therefore adverse; and that this adverse holding has operated to defeat and extinguish any title or easement beyond that actually used by the company.

The railway company, on the other hand, contends that it only acquired an easement, and that the fee remained in the owner, and that the owner of the fee has the right, so long as an exclusive occupation of the right of way is unnecessary for the operation of the road, to make such use of the surface as is not inconsistent with the easement, and that the use for agricultural purposes was a use consistent with the rights of appellant, and, therefore, not adverse.

We are of opinion that the grant presumed to have been made by Telford was a grant, not of the fee, but of an easement. The doctrine of eminent domain rests upon the presumed necessity for the taking of private property for a public use. The taking, to be consistent with this theory, must therefore ordinarily be limited to the apparent necessities of the public. Statutes authorizing a taking of private lands for railway purposes generally limit the taking to an easement, leaving the fee in the owner. When the statute does not clearly authorize the condemnation of the fee the easement alone should be condemned. This charter method of condemnation does not expressly condemn the fee, and we think the "grant" presumed and the "title" acquired is a

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grant of an easement and the title to the easement, and nothing more. Cooley Con. Lim. (5th Ed.), 691; *Washington Cemetery Company v. Railway Company*, 68 N. Y., 594; Lewis' Em. Domain, Section 278.

The fee, under this construction, remained with the owner, the railway acquiring a mere easement. The rights of one having an easement in the lands of another are measured and defined by the purpose and character of the easement; and, from this, it follows that the owner of a fee subject to an easement, may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement. As said by Judge Cooley, in considering the rights of the owner of the fee, where an easement has been condemned for public uses, "if there can be any conjoint occupation of the owner and the public, the former should not be altogether excluded, but should be allowed to occupy, for his private purposes, to any extent not inconsistent with the public uses." Con. Lim., 691.

What was said on this subject by the Supreme Court of Kansas is so applicable, and so thoroughly states our view of the law, that we quote a paragraph: "An easement merely gives to a railroad company a right of way in the land—that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining, and operating a railroad thereon. Under this right,

the company has the free and perfect use of the surface of the land so far as is necessary for all its purposes, and the right to use as much above and below the surface as may be needed. This would include the right to tunnel the land, to cut embankments, to grade and make road-beds, to operate and maintain a railroad with one or more lines of track, with proper stations, depots, turnouts, and all other appurtenances of a railroad. The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance and abandonment of the right of way, the entire and exclusive property and right of enjoyment revert in the proprietor of the soil. After the condemnation and payment of damages, the soil and freehold belong to the owner of the land, subject to the easement or incumbrance, and such land-owner has the right to the use of the condemned property, provided such use does not interfere with the use of the property for railroad purposes. In some cases the right of the owner of the soil would practically not amount to any thing, because the purposes of a railroad company might require the use of all the land taken to such a degree as to forbid the owner from any benefit whatever. The paramount right is with the railroad company, and the land-owner can do nothing which will interfere with the safety of its road, appurtenances, trains, passengers, or work-

men." *Kansas Central Railroad Company v. Allen*, 22 Kan., 285 (S. C., 31 Am. Rep., 190); see also *Proprietors, etc., v. N. & L. Railroad Company*, 104 Mass., 1 (S. C., 6 Am. Rep., 181).

The use by Telford of the condemned land alongside of the railway company for agricultural purposes, so long as same was not required for a purpose of convenience or necessity by the railroad company, was a use entirely consistent with his rights as the owner of the fee, and was not incompatible with the easement granted the railway. It was a use not made under a notice to the owners of the easement that its purpose was adverse to the easement, and it was not therefore adverse. The railway company had the right to terminate such use whenever they desired to put the land to a use incident to the operation of their railway, and, in constructing a track thereon, they did not appropriate any property belonging to defendants in error.

The judgment must be reversed, and the suit having been tried without a jury, we now render such judgment as should have been pronounced by the Circuit Judge. The suit will therefore be dismissed at the cost of the appellee.

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RAILWAY COMPANY v. HICKS.

(*Knoxville*. November 1, 1890.)

1. RAILWAY COMPANIES. *Erroneous charge as to observance of precautions for prevention of accidents.*

Charge of Court to the effect that it is the duty of the engineer and other operatives on a railway train to use all means in their power to stop the train and prevent an accident "whenever" or "as soon as" the plaintiff appeared on the track, without reference to the distance in advance or the danger of collision, is erroneous, when applied to a person in the employ of the company, who, in due course of his business, was traveling at the time of the accident along the track upon a velocipede in front of and in same direction as the train, and whose duty it was to surrender the track to approaching trains.

2. SAME. *Correct charge upon the case stated.*

The Court should have instructed the jury, as applicable to the facts stated above, "that when plaintiff appeared on the track, if he was then in such proximity to the train that danger to his person was probable, or if afterward the train came so near to him as to render it likely, under all the circumstances, that he might be injured if the train were not stopped, then it was the duty of the engineer and other operatives to use all the means in their power to stop the train and prevent a collision."

FROM SULLIVAN.

Appeal in error from Circuit Court of Sullivan County. A. J. BROWN, J.

Railway Company v. Hicks.

W. M. BAXTER, HAYNES & HAYNES, and KIRKPATRICK & WILLIAMS for Railway Company.

THOMAS CURTIN for Hicks.

CALDWELL, J. That part of the charge set out in the first assignment of error is erroneous in so far as the jury were therein told that the law required the engineer and other operatives on the train to use all means in their power to stop the train and prevent an accident "whenever" or "as soon as" the plaintiff, Hicks, appeared on the track, without reference to the distance in advance at which he may have so appeared, and without reference to the presence or absence of danger at the particular time.

The plaintiff himself was an employe of the railway company, engaged in its business and rightfully on its track at the time, passing from station to station on a railway velocipede, in the same direction that the train was moving. He was prepared to give the right of way to all trains on short notice, and it was his duty, to himself and to the company, to do so whenever he discovered the necessity for it.

Therefore, the employes operating the extra train, on seeing him in the distance—if such was the fact—were authorized to assume that he would surrender the track in time to save himself, and to act on this assumption so long as not refuted by the actual fact of his remaining in the way

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until the train came in such proximity to him as to make danger of an accident probable.

The logic of the rule applied by the trial Judge would require that a train be stopped as soon as in sight of section hands at work on the track, when in fact and in reason such hands are expected to continue at work until the train comes reasonably near, and then get out of the way, without causing the train to stop at all.

Instead of that part of the charge herein referred to as erroneous, the Court should have instructed the jury, in substance, that when plaintiff appeared on the track, if he was then in such proximity to the extra train that danger to his person was probable, or if afterward the train came so near to him as to render it likely, under all the circumstances, that he might be injured if the train were not stopped, then it was the duty of the engineer and other operatives to use all the means in their power to stop the train and prevent a collision.

Reverse and remand.

SIMPSON v. RAILWAY COMPANY.

*(Knoxville. November 1, 1890.)*1. EVIDENCE. *Parol not admissible to prove appointment of receiver by decree.*

Parol evidence is not admissible to prove appointment of a receiver made by decree.

2. ABATEMENT, PLEA IN. *Insufficient in substance.*

Suit against a railway corporation will not be abated upon its plea averring that the suit had been brought after the road had passed into the hands of a receiver, and that process had been served upon a station agent of the receiver, where it appears that such agent had been originally employed by the company, and continued in same service under the receivership.

3. SAME. *Not waived by continuances after filing of plea.*

Plea in abatement is not waived by continuances of cause by consent after it has been properly filed.

4. SAME. *Waived by appearance to the merits.*

Appearance and defense to the merits after plea in abatement has been overruled upon a trial, is a waiver of the plea.

Cases cited and approved: 1 Heis., 15; 7 Lea, 635.

5. SAME. *Pleading over not allowed after trial on issue tendered by plea.*

After trial upon the issue tendered by plea in abatement, if the finding is adverse to the plea, the defendant is not entitled to plead over to the merits, but the plaintiff takes judgment without further pleading.

Cases cited and approved: Bacon v. Parker, 2 Tenn., 55, 56; Straus v. Weil, 5 Cold., 120-126; Wilson v. Scruggs, 7 Lea, 635-638; Hunter v. Trobaugh, oral opinion, Knoxville, 1887.

Cited and overruled: Battelle & Co. v. Youngstown Rolling Mill Co., 16 Lea, 355.

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The rule is otherwise when plea is held insufficient and dismissed on motion or demurrer. (Code, § 4395 (T. & S.); § 5138 (M. & V.). Cases cited and approved: *Baker v. Compton*, 2 Head, 470; *Whitaker v. Whitaker*, 10 Lea, 98.

FROM WASHINGTON.

Appeal in error from Circuit Court of Washington County. A. J. BROWN, J.

I. E. REEVES and INGERSOLL & PEYTON for Simpson.

W. M. BAXTER, DEADERICK & EPPS, and KIRKPATRICK & WILLIAMS for Railway Company.

SNODGRASS, J. The two suits in this record were brought by plaintiff in error, on August 28, 1885, before a Justice of the Peace in Washington County, against the railway company, defendant, for damages, one for burning fence-rails, grass, and timber, and the other for killing the hogs of plaintiff, Simpson.

The summons to answer was in each case returned "executed, and set for hearing before S. T. Shipley, Esq., March 27, 1886."

The defendant on same day filed pleas in abatement, averring that T. L. Ernest, upon whom the summons to answer in each case was served, was

not the agent of the defendant, and praying that the suits be abated.

Judgments were rendered by the Justice in favor of plaintiff, and defendant appealed. The cases were then heard upon the pleas. The Circuit Judge found in favor of defendant and abated the suits, and plaintiff appealed in error.

The assignment of errors states three objections to the judgment. We state them in inverse order, as follows:

First.—That the Circuit Judge erred in admitting oral proof of the appointment of a receiver to take charge of defendant's road, the evidence having been objected to and overruled.

This objection was well taken, but the action upon it was immaterial in the view we have taken of the case.

Second.—The Court erred in finding for defendant on the pleas in abatement, because the "proof shows that after the pleas in abatement were overruled by the Justice, the defendant waived its objection to the jurisdiction by appearing and making defense upon the merits."

Upon this assignment the transcript is cited showing continuances by consent. These continuances were after the pleas were filed, and are not to be construed as affecting the defendant further than as such upon its pleas. Having filed the pleas, if not ready to go to a trial on them, or willing that plaintiff might not do so, it might consent to a continuance, and its appearance would

not be thus entered for any other purpose than to continue for trial the issue thus presented, and would not be an appearance on the merits.

Evidence is also cited tending to show that defendant, by its attorney, participated in the trial on the merits *after* the pleas were overruled, and examined witnesses.

If this were established, such appearance would be to the merits, and would waive the plea in abatement. If a defendant wishes to avail himself of the advantage of such plea, he must abide by it, and decline to plead over or appear to the merits. 1 Heis., 15; 7 Lea, 635, 637, 638.

The evidence tended to show this, but was not entirely clear or harmonious on this point, particularly as to such examination being *after* the trial on the pleas, and an examination on trial of the pleas might have included some irrelevant questions. Besides, there is evidence to the contrary upon which the judgment of the Court could have been founded, and it would not for this reason be reversed.

The third assignment is that it was error to sustain the pleas in abatement, because Ernest, the depot agent at Jonesboro, where suit was brought, was the proper person upon whom to execute summons to answer, the proof showing that he had received his appointment from the defendant company, and had never been relieved or discharged from such employment, the fact that defendant's road had been placed in the hands of a

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receiver pending litigation not having that effect if taken as proved.

This assignment is well taken. It will be remembered that this is no effort on the part of the receiver to abate suits by reason of a right to intervene and compel a discontinuance of actions except in Court where the receivership with litigation involving it is pending but an effort by the company to deny its agent because its road had been placed in the hands of a receiver. In such case no reason appears to us why he does not still, in a proper sense, represent the company which in another is represented by the receiver.

For this error, therefore, the judgment is reversed, and the case remanded for assessment of plaintiff's damages by the Circuit Judge, this being a non-jury case.

On this point a question is made that defendant has the right to plead over. Such would be the rule on striking out a plea in abatement as frivolous, or overruling it on demurrer, or when held insufficient. *Baker v. Compton*, 2 Head, 470; *Whitaker v. Whitaker*, 10 Lea, 98; Code, § 4395.

But where the issue tendered by the plea has been tried on the merits, there can be no further pleading, but plaintiff is entitled to have his damages assessed. *Bacon v. Parker*, 2 Tenn., 55, 56; *Straus v. Weil*, 5 Cold., 120-126; *Wilson v. Scruggs*, 7 Lea, 635-638.

This has always been the rule, though there has been some misapplication of it in reported

cases. Some of these are referred to and discussed in the 7 Lea case cited, which is an instructive one on this question. In a subsequent case, which arose in equity, the Court apparently held the contrary. *Battelle & Co. v. Youngstown Rolling Mill Co.*, 16 Lea, 355.

That case, however, did not decide, if technically confined to the precise legal effect of point adjudged, that on a plea in abatement found *against* defendant he may plead over, because it found the plea in *favor* of defendant, and of course ended the case at that point. But the question was fairly involved, because the Chancellor's action allowing defendant to plead over was approved in the opinion, and the reasoning leads to that result.

The Judge delivering the opinion in that case referred to several of our cases on that subject, criticising some of them and showing that the question did not necessarily arise in others, and implying that there was a difference in the rule as applied at law or in equity, saying, in reference to the 5 Coldwell case cited, that it was "an attachment at law, and therefore can decide nothing as to a case in equity, even if what is said on that question had been involved for decision." Elsewhere he adds: "There is no case where the rule has ever been applied in a case in chancery, and none ought to be; nor any at law where the question was before the Court for adjudication."

It is true that most of the cases cited were at

law, but there is no reason for any distinction, and none exists in the application of this rule in law and equity. It is also true that in some of the cases there were decisions of this question without necessity, but such was not the fact in others. Besides, the view announced was early taken in our Court as a correct application of the common law rule, which it was, and was maintained as the correct view of it by undivided Courts whenever the question arose or was supposed to arise and come in controversy since.

These cases sustain themselves both in reasoning and by citation of authority. The rule thus stated is approved by Mr. Caruthers, confessedly the most accurate and clear-headed author among all text-book writers. Hist. Lawsuit, Sec. 188.

It has met the approbation of the profession ever since our Court was organized, and we think is sound, and adhere to it.

We held it applied in equity as at law in the case of *Hunter v. Trobaugh*, at Knoxville in 1887, and refused to follow the ruling in the 16 Lea case to the contrary, as we have since declined to do in other cases. That case is therefore overruled.

The defendant in error will pay the cost of this Court.

RAILWAY COMPANY v. MAHONEY, Adm'x.

(*Knoxville*. November 1, 1890.)

1. RES ADJUDICATA. *Language of judgment limited to the matter decided.*

A judgment is *res adjudicata* only as to matters in issue, though its language undertakes to embrace and decide more.

Case cited and approved: *Sanders v. Logue*, 88 Tenn., 359.

2. SAME. *Case in judgment.*

Judgment of this Court determining that it is erroneous to dismiss an administrator's suit upon demurrer for want of averment in the declaration that the County Court had jurisdiction to appoint him, does not preclude subsequent attack upon his representative character by proper plea, although the entry of record undertakes to determine that "the validity of plaintiff's letters of administration is not open to attack in this suit."

Cases cited and approved: *Cheek v. Wheatly*, 11 Hum., 555; 11 Ired., 296; 4 Denio, 85.

3. ADMINISTRATION. *Collateral attack upon appointment of personal representative.*

An administration, granted by a County Court of this State upon the estate of an intestate whose domicile at the date of his death was in Tennessee, cannot be collaterally attacked by plea which admits these facts, and denies the plaintiff's representative character upon the sole averment that the intestate resided at the date of his death in a county other than that in which the administration was had. The County Court having general jurisdiction in such case, its determination that the jurisdictional facts exist is conclusive upon collateral attack, and its judgment need not recite these facts.

Case cited and approved: *Brien v. Hart*, 6 Hum., 131.

Cited and distinguished: *D'Arusment v. Jones*, 4 Lea, 251.

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4. SAME. *Same.*

But the plaintiff's representative character may, in a proper case, be put in issue by a proper plea of *ne unques administrator*; and this plea is in bar, and may be presented with the general issue.

Cases cited and approved: *Cheek v. Wheatly*, 11 Hum., 555; 11 Ired., 296; 4 Denio, 85.

5. SUPREME COURT PRACTICE. *No reversal if judgment is correct though reasons are erroneous.*

A correct judgment will not be reversed, although the lower Court assigned insufficient reasons for its rendition.

6. SAME. *Rule as to setting aside verdict upon the facts.*

Verdict of jury will not be disturbed by this Court where there is any legitimate evidence to support it, there being no other error.

Cases cited: *Jones v. Jennings*, 10 Hum., 428; *Dodge v. Brittain*, Meigs, 85; *Pettitt v. Pettitt*, 4 Hum., 191; *Walker v. Galbreath*, 3 Head, 315; *Nance v. Haney*, 1 Heis., 177; *Morris v. Swaney*, 7 Heis., 602; *Tate v. Gray*, 4 Sneed, 591; *England v. Burt*, 4 Hum., 399; *Nailing v. Nailing*, 2 Sneed, 630; *Vaulx v. Herman*, 8 Lea, 683; *Turner v. Turner*, 85 Tenn., 387.

7. PLEADINGS AND PRACTICE. *Amendment of declaration not error, when.*

Amendment of declaration, upon leave of Court, so as to change the defendant's name from "*railroad company*" to "*railway company*" constitutes no error, especially where there has been no plea of misnomer but an appearance by defendant and trial upon the merits.

8. SAME. *Amendment of declaration relates to commencement of suit, when.*

Amendment of declaration which does not introduce a new and different cause of action, but merely supplies facts omitted in statement of the original cause of action, relates to commencement of the suit, and is not barred if the suit was brought in time, though the statute of limitations had run when the amendment was made.

Case cited and approved: *Railroad v. Foster*, 10 Lea, 351.

9. PRACTICE. *As to setting aside a third verdict upon the facts.*

The statute providing that "not more than two new trials shall be granted to the same party in an action at law, or upon trial by jury of an issue of fact in equity," deprives the trial judge of any power

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to set aside the third verdict of a jury upon the sole ground that the evidence is *insufficient* to support it, where two former verdicts in the same case have been set aside upon motion of the same party for that cause alone.

Code construed: § 3835 (M. & V.); § 3122 (T. & S.).

Cases cited and approved: *Malone's Lessee v. Deboe*, 4 Hay., 259; *Trott v. West*, 10 Yer., 499 (S. C., Meigs, 163); *Turner v. Ross*, 1 Hum., 16; *Wilson v. Greer*, 7 Hum., 513; *Ferrell v. Alder*, 2 Swan, 77; *Railroad v. Hackney*, 1 Head, 169; *Whitemore v. Haroldson*, 2 Lea, 313; *Caruthers v. Crockett*, 7 Lea, 91; *Burton v. Gray*, 10 Lea, 581; *Knoxville Iron Company v. Dobson*, 15 Lea, 417; *Railroad v. McKemy* (oral opinion at Knoxville, September Term, 1887).

10. SAME. *Same.*

But this statute has no application to a case in which there is *no evidence* to support the verdict, and in such case the trial Judge may set aside even a third or any subsequent verdict of a jury in the same case and upon motion of the same party.

Case cited and approved: 134 U. S., 614.

11. SAME. *Same.*

The allegation that there is *no evidence* to sustain the verdict of the jury cannot be successfully maintained "if the conclusion does not follow, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

12. CONSTITUTIONAL LAW. *Statute forbidding Courts to set aside third verdict of jury constitutional.*

The statute forbidding Courts to set aside third verdict of jury when thus construed, is constitutional.

Constitution construed: Art. II., Sec. 2; Art. I., Secs. 6, 8.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. S. T. LOGAN, J.

Railway Company *v.* Mahoney, Adm'x.

D. H. POSTON, W. M. BAXTER, HENDERSON & JOUROLMON for Railway Company.

WAT M. COCKE, and INGERSOLL & PETTON for Mahoney.

SNODGRASS, J. The husband of defendant in error was an engineer in the service of the Memphis and Charleston Railroad Company. While in such service he was killed on December 25, 1886, by the derailing of his engine.

His widow was appointed administratrix of his estate by the County Court of Knox County, and brought this suit in the Circuit Court for \$20,000 damages against the East Tennessee, Virginia and Georgia Railway Company, alleging that said company was the lessee and running and operating the road on which her husband was killed, and that such killing was occasioned by the negligence of said company, acting through its officers and servants, the superiors of deceased.

There were two trials below, and verdicts in favor of the plaintiff. Both were set aside by the Judge because not sustained by the evidence. Finally the case was dismissed on demurrer of defendant, because the declaration did not sufficiently show that the County Court of Knox County had jurisdiction to appoint the administratrix who was suing herein.

The plaintiff appealed, and at the last term of this Court the judgment was reversed and the case remanded for further proceedings.

In the judgment here reversing that below it is recited that "the validity of plaintiff's letters of administration is not open to attack in this suit," and in the subsequent proceeding in the Court below this recital was treated as an adjudication of the question which had been presented, as well as of that which the defendant attempted subsequently to present by plea denying the validity of the appointment, upon the ground that deceased resided in Tennessee at the time of his death but had no residence in Knox County. It is argued here that such recital in the judgment is *res adjudicata*.

This position is incorrect. As said in the case of *Sanders v. Logue*, 4 Pickle, 359, "the precise verbiage of decrees cannot always be noticed or shaped by any Court in the very nature of things under our practice." If the language used makes the judgment broader than the point in decision permitted, the effect of it is limited to that point, as was decided in that case and has been decided in numerous others not necessary to cite.

The point in issue, and which the Court was determining, was whether a suit of an administratrix could be dismissed on demurrer because the declaration did not show that the County Court of Knox County had jurisdiction to appoint her.

The Court determined this question negatively, and reversed. No written opinion was given, because it was deemed wholly unnecessary. No declaration has to show affirmatively that the County Court appointing an administrator who brings a

suit had jurisdiction to appoint him in every suit he may bring requiring a declaration. It is always sufficient to aver the representative character; and if it is averred, it is obvious that the pleader need not go further and "sufficiently show the jurisdiction of the appointing Court." This proposition, never having been controverted in any opinion of this Court or any other, we thought too plain for controversy, particularly when our Court had held that on a mere averment of the representative character the presumption of the validity of the appointment was so strong that a plea denying it would have to traverse every ground upon which such appointment might have been lawfully made by a County Court (*Hale v. Kearly*, 8 Bax., 50, 51)—the exact converse of the proposition that the declaration must affirmatively show that the appointment was lawfully made.

The Court having for this reason determined this question without writing that which it was supposed every one would deem superfluous, the decree was entered, and it seems that the language employed, instead of showing that the validity of the letters of administration was not open to inquiry in this suit because of the failure to sufficiently show the jurisdiction of the County Court, states that such validity is "not open to attack in this suit." The general terms used are therefore too broad, and are in their meaning and effect limited to the point in issue and then being determined, according to the principle of the Logue

case referred to. In this view, the question whether the language used in the judgment was inadvertent in its preparation or express from the Court is immaterial. The result is the same. The decision was as stated and no more—could extend no further.

It follows, then, that the defendant was not cut off from any contest as to the representative character of the plaintiff, and a proper plea denying that plaintiff was administratrix might still be entertained after the reversal (*Cheek v. Wheatly*, 11 Hum., 555), as such proper plea of *ne unques administrator* is not in abatement, but in bar (*Shown v. Barr*, 11 Ired., 296), and may be pleaded with the general issues (*Flynn v. Chase*, 4 Denio, 85). See 2 Williams on Executors, p. 1595-1654 and notes, 4 Am. Ed.

The defendant filed a plea which does not deny that plaintiff was appointed administratrix by the County Court of Knox County, but "traverses the allegation that she was the *legal representative*, and avers that at the date of the death of Thos. Mahoney his usual place of residence was in Shelby County, Tennessee, and that at that date he had no fixed residence in Knox County."

Not having denied in this plea that the County Court of Knox County had appointed plaintiff as the declaration averred and letters of administration (of which profert was made, oyer craved, and letters set forth) showed, that fact is admitted in the plea. Code, § 2907 (M. & V., 3620).

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The only issue tendered by the plea was that the appointment as made was invalid because of the non-existence of certain facts upon which the jurisdiction of the County Court to make it depended.

This plea was, on motion of plaintiff, stricken out. The reason assigned by the Court for striking out was that the question was settled by judgment of this Court that such defense could not be made. We have seen that this was not correct; but if the action of the Circuit Judge was correct, however erroneous the reason assigned for it may be, the judgment will of course be sustained.

This brings us to the question whether such question can be raised by plea, and the appointment of an administrator collaterally attacked upon averment of facts showing that no residence of an admitted intestate (residing at time of death in Tennessee) was in the county wherein the appointment was made by the County Court.

It has long been settled in this State that as to matters of administration the County Court is a Court of general jurisdiction. *Brien v. Hart*, 6 Hum., 131.

In consequence it follows—first, that its judgment, exercised in the appointment of an administrator, need not recite the facts upon which it was made; and, second, that, being authorized to determine for itself the existence of the facts which authorize it to appoint an administrator on

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the estate of an intestate resident of Tennessee, its determination of such facts is conclusive in any collateral attack in another Court.

Of course the rule could not extend to a case where no appointment could be legally made by any Court; as, on estate of a living man. 4 Lea, 251. The plea, therefore, presented no defense, and was properly stricken out.

The case was then tried on its merits on issues raising all the questions to be hereinafter noticed, before a special jury (demanded by defendant). This trial resulted in a third verdict against defendant for \$4,750. Motion for a new trial being overruled, defendant appealed, and assigned errors. In addition to the question already discussed, the errors assigned are:

First.—That it was error to allow an amendment of writ and declaration so as to substitute *railway company* for *railroad company*.

The writ does not appear to have been so amended. The supplied writ in the record runs against the railway company. The declaration was amended, but it is well settled that such amendment is proper. Besides, it was immaterial, there being no plea in abatement for misnomer. Caruthers' Hist. Lawsuit, Sec. 189. And, finally, the objection was waived by appearance and trial on the merits.

Second.—It was error to render judgment against the East Tennessee, Virginia and Georgia Railway Company, because there was no proof to show it

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was operating the Memphis and Charleston Road, or had plaintiff's intestate in its employment when killed.

There was evidence to this point, and the jury was authorized to pass upon it, and has done so. The verdict, under the rule, cannot be disturbed where there is any legitimate evidence to sustain it.

Third.—It was error to allow plaintiff to amend her declaration on June 24, 1889, so as to insert an averment that her husband was "temporarily residing in Memphis, but with his home in Knoxville" when killed, because the killing was on December 25, 1886, and suit was barred when the amendment was made, more than a year having elapsed.

We have already seen that this amendment was immaterial; but had it been material, it would have been authorized at that date, the statute of limitations having nothing to do with it. The suit had long since been properly brought, and within the year, by and against proper parties. Amending the declaration did not affect the pendency of the suit nor originate a new one. It but added an averment in a case already stated. *Railroad v. Foster*, 10 Lea, 351.

Fourth.—That "the Court erred in not setting aside the verdict and granting a new trial, for having found 'that on the merits he was of the opinion, as before, that the death of the decedent had been caused, proximately, by his own negligence in running his engine too rapidly, but

as two juries had passed upon same facts, and two new trials had been granted, the Court did not feel justified in granting another new trial under the statute and the decisions of our Supreme Court.' Record, 219. This being so, he should have vacated the verdict and judgment—

"1. Because it was his prerogative and duty, under such circumstances, to have granted a new trial, as the statute to the contrary trenches upon the judicial power, and is void. Art. II., Sec. 2, Constitution of 1870.

"2. The statute preventing the Court in jury trials from setting aside the third verdict is unconstitutional and void, being violative of Article I., Sections 6 and 8, of the Constitution of Tennessee, and the fourteenth amendment to the Constitution of the United States, which provides: 'No man * * * shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land.' For all of which and other good and sufficient causes, plaintiff in error asks a reversal."

This brings us to a consideration—or, rather, reconsideration, for the question has been often before the Court—of our statute, to which the Circuit Judge referred, providing that "not more than two new trials shall be granted to the same party in an action at law or upon trial by jury of an issue of fact in equity." Code, § 3122 (T. & S.).

The section of the Code quoted is the Act of
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1801, Chapter 6, Section 59. It has been often before the Court for construction—the first time, so far as we can find from our reported cases, in 1817. The question there made was that the verdict was contrary to the law and evidence. It was the third verdict, and the Court held that the motion “to set aside this third verdict of a jury on a matter properly before them ought not to have succeeded.” The Court said: “The evidence, if not doubtful, perhaps preponderated against the verdict, but it was the province of the jury to determine for themselves.” *Malone's Lessee v. Deboe*, 4 Hay., 259.

The next reported case found was in 1837 or 1838. It appears in 10 Yerger as of December Term, 1837, and in Meigs' Report as of December Term, 1838—*Trott v. West, Moss & Co.*, 10 Yer., 499; Meigs, 163. In that case the Court construed the Act to mean “that where the facts of the case have been fairly left to the jury upon a proper charge of the Court, and they have twice found a verdict for the same party, each of which having been set aside by the Court, if the same party obtain another verdict in like manner, it shall not be disturbed. But this Act did not intend to prevent the Court granting new trials for error in the charge of the Court to the jury, for error in the admission or rejection of testimony, for misconduct of the jury, and the like.”

While, as we have seen, this appears to be the second reported case on the subject, the Court

added: "This we should consider the proper construction of the Act if we were now, for the first time, called upon to expound it; but such having been the uniform practice of the Courts since its passage, we are the better satisfied with this view of it." And so this construction seems to have been often given it in oral or unreported cases.

The Act was again so construed in *Turner v. Ross*, 1 Hum., 16, and in the following cases: *Wilson v. Greer*, 7 Hum., 513; *Ferrell v. Alder*, 2 Swan, 77; *E. T. & Ga. R. R. Co. v. Hackney*, 1 Head, 169; *Whitemore v. Haroldson*, 2 Lea, 313; *Caruthers v. Crockett*, 7 Lea, 98; *Burton v. Gray*, *Kirkman & Co.*, 10 Lea, 581; *Knoxville Iron Company v. Dobson*, 15 Lea, 417.

These cases all agree in holding the rule to be as laid down in the 10 Yerger case. Four of them are exceptional in points to be noted as deciding something more or beyond the others. The cases in 1 Humphreys and 2 Swan settled that, if the record was silent as to the reasons upon which the first two new trials had been granted, the Court would presume that they were granted upon the merits, and a third trial would be refused; and if such new trials were granted for other reasons—as for error in charge of Court and the like—and party obtaining them does not want to be precluded from a third, under the statute he must make the record show the reasons for the action of the Court granting them when done. It could not otherwise be shown.

In the 10 Lea case it was said that where the jury has found "more than twice, in the same case, in favor of the same party, the power of the Court is exhausted, and the verdict, although it may be against the law and justice of the case, must stand." Respecting the verdict then being considered, it was added: "Whether such was the case with this verdict is immaterial." What the evidence was in that case was not stated, nor that it was insufficient. The comment, therefore, was that of the Judge delivering the opinion expressing his view of the result of former decisions. In fact, there was nothing in that case which extended the effect of the statute beyond the other cases.

The 15 Lea case was to the same effect as the others on the point considered. Referring to the refusal of the Circuit Judge to grant a new trial because the evidence was *insufficient* to support the verdict, the Judge delivering that opinion said: "If the Court has, in the same case, set aside, upon the motion of the same party, the verdicts of two juries, upon the ground that the evidence is not sufficient to sustain them, the power of the Court is at an end to grant another new trial upon the facts or merits."

This case was explicitly upon the point that the Circuit Judge could not grant a new trial because the evidence was *insufficient*. The point was not made in the case, nor in any other preceding it, that there was *no evidence* to sustain the verdict,

and it did not adjudge this, as the others had not, though the language used in several of the cases had been as broad as could be applied to the points in judgment in each case.

In all of them the statute was construed so as to show what it meant as a whole, and in doing so all adopted the construction first fully stated by Judge Green in the 10 Yerger case, which we have quoted; and such is a correct rule in reference to the power of a Court to construe a statute—that is, whenever the statute is involved and construction required, the Court may, and generally should, state the proper construction of the statute, and then say whether, thus construed, it applies to the particular case. It may of course decline a construction, and say that the case before the Court does not come within its meaning; but because it may do this, and thereby avoid saying what the statute does mean, does not affect its right and power to construe it when involved, and then apply it to the case in hand, or show that the case is not within the construction. Such was the rule acted upon by the Supreme Court of the United States on this question in a case to be cited further on in this opinion.

Judge Green, in the case of *Trott v. West, Moss & Co.*, just referred to, in 10 Yerger, construed the statute now being considered to apply to the granting of new trials upon the facts or merits, where the facts had been fairly left to a jury under a proper charge, and not to apply to

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errors in charge of the Court, or in the admission or rejection of testimony, or for misconduct of the jury, and the like, and this in a case where there was no objection to the verdict because of any error of Court or misconduct of the jury, and not even a bill of exceptions containing all the evidence.

But it is not necessary to pursue this discussion. We have seen the rule under which it was so construed, and that it properly might have been done as it was done, and may leave it for more important matter.

Returning to the 15 Lea case: There it was further held that the statute applied to this Court as well as to the inferior Courts.

Thus the law stood construed when it again came before the present Court for construction at its September Term, 1887, in case of *East Tennessee, Virginia and Georgia Railway Company, in error, v. McKemy*.

The majority of this Court, after determining that the evidence was insufficient to support the verdict, held that it was bound by the statute to permit it to stand, being a third verdict of which the other two had been set aside as founded on insufficient evidence.

The statute was again applied by us at Jackson, in 1889, in the case of *Louisville and Nashville Railroad Company, in error, v. Woodson*, now reported in 134 U. S., 614 (Lawyers' Coop. Ed., Book 33, page 1032). In that case the Court

determined that there was *no evidence* to sustain the verdict, but being a third of which the first and second had been set aside on the merits, the statute was held to prevent reversal.

The railroad company carried the case before the Supreme Court of the United States, insisting that the statute was void under the fourteenth amendment to the Constitution of the United States, providing that no State shall pass any law which shall deprive any person of life, liberty, or property without due process of law—this Court, after giving the Act the construction stated, having adjudged that it was not in conflict with such amendment to the Constitution. This was the first time this constitutional objection was made to this statute, as appears from the reported cases cited.

The Supreme Court of the United States held that the Act bore no such construction. It said (after quoting many Tennessee cases, including several of those we have cited): "From these decisions it is clear that in Tennessee, as elsewhere, although the jury are the judges of the facts, yet the Judge has power to set aside the verdict when in his judgment it is against the weight of the evidence, but that that supervisory power cannot be exercised under the statute when the triers of the facts have three times determined them the same way. This manifestly refers to a state of case where, in the opinion of the Judge, the verdict should have been otherwise than as rendered,

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because of the *insufficiency* of the evidence to sustain it, but not to a case where there is no evidence at all. * * *

“Tested by this rule, whenever the statute is applied, it must be upon the assumption that although the Court would have found a different verdict because of the weakness of the evidence, yet there was some evidence tending to establish the cause of action. * * *

“We can perceive nothing in the statute *thus applied* which amounts to an arbitrary deprivation of the rights of the citizen, and concur with the Supreme Court of Tennessee that this Act, which had been in force for more than sixty years before the adoption of the fourteenth amendment, was not invalidated by it.”

The Supreme Court of the United States had already, as shown in quotation, decided that the Act could not be construed to mean that a third verdict must be sustained when there is no evidence to sustain it, and that our decisions construing it were not to the contrary up to the Woodson case, and that the statute must be applied to cases where there is some though weak evidence, before it came to the point of concurring with this Court in holding the Act valid; that is to say, it held the Act valid because it gave it a different and less obnoxious construction. It plainly showed the Act to be void in the opinion, if it had the construction which this Court had given it.

To meet the difficulty of agreeing in the result

on antagonistic opinions as to the construction, it held that the judgment of this Court that there was *no evidence* to support the verdict, did not mean what it said, but merely meant that "the jury ought not to have found the verdict that they did, and that the judgment of the Court below refusing to grant a new trial upon the facts would have been reversed but for existence of the statute which made it error to award it." "For," says that Court, "the statement in the judgment of affirmance of the Supreme Court of Tennessee is that the Court adjudges that there is *no evidence* to support the verdict of the jury," and, "if this were taken literally, it would follow that no recovery *could be had*."

We need not stop here to show that the language used in the judgment of this Court had its own meaning, and not that given it by the Supreme Court of the United States. If we had intended to hold that there was *some* evidence to support the verdict, though not satisfactory, the statute would not have been applied at all in order to affirm it; for this Court has always, independently of this statute, acted on the rule that it will not disturb the verdict of a jury, whether on a third, second, or first trial, if there is any evidence to sustain it. The judgment in that event would, therefore, have been affirmed without reference to the statute. Using unambiguous terms to express another and different meaning, it was thought they were so plain as to be susceptible

of but one construction. Had they received it, the statute would have fallen, according to the plain meaning of the opinion. That opinion was conclusive of the question in the case, and settled the construction of the statute in opposition to the view there taken of it by this Court, holding, as it did, and correctly, that this case had gone further than any other on this question, and that the other cases meant no more than that the Judge could not set aside a third verdict where there was any evidence upon which it could be sustained, although he might think it weak or insufficient. We yield to that construction, as we must, and apply the statute thus construed in this case.

If, then, there was any evidence to sustain this verdict, the Circuit Judge could not have set it aside, and therefore correctly let it stand, although dissatisfied with it, because it was the third one in a series, of which he had set aside two on the ground that the evidence did not sustain them (it being his duty to have gone that far if dissatisfied with them upon the evidence); and we must affirm that action under the statute, because a third verdict cannot be set aside unless there is no evidence to sustain it—"if the conclusion does not follow, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." It therefore follows that this Court cannot set aside such third verdict in favor of the same party because the Circuit Judge expressed dissatis-

faction with it. On the contrary, this is the very case to which the statute applies. If, upon a first or second trial, the Circuit Judge is dissatisfied, because the evidence does not preponderate in favor of the verdict; or does not support it, though there was some evidence upon which it might have been based, it is his duty to set it aside, and we will do so if it appears he did not approve it and yet permitted it to stand. But as to a third verdict, under the statute being considered, the rule is different. If there is any evidence to sustain it, he must allow it to stand because of the statute, and this is just and reasonable; for, if he might always set aside a jury verdict because he disagreed with the jury as to effect of the evidence, when there was evidence upon which different views might be taken, the Circuit Judge could prevent a result being reached; and so a verdict would or might always go for nothing. Some law was necessary to end this conflict of opinion. This law does that, and that only.

It follows that it is not reversible error for the Circuit Judge to refuse to set this verdict aside merely because he was dissatisfied with it; and the fourth assignment of error is bad.

The statement of the Circuit Judge was not that there was no evidence to sustain the verdict, and the objection to it was not to this effect, nor is there any assignment that the verdict is not sustained by *any* evidence.

His statement was merely that he was of opinion that "the death of the intestate had been proximately caused by his own negligence." This was the conclusion he came to from the evidence. He does not state that there was no evidence upon which the jury could have come to a different conclusion, and, as we have seen, there is no such question elsewhere or otherwise made in this record.

The plaintiff in error has elected to put its case upon the necessity of the Circuit Judge's setting aside the verdict because he was not satisfied with it upon the evidence, it being his duty ordinarily to set aside a verdict where the evidence preponderates against it (*Tate v. Gray*, 4 Sneed, 591), and also where, upon the evidence, he is not satisfied with it (*England v. Burt*, 4 Hum., 399; *Nailing v. Nailing*, 2 Sneed, 630; *Vaulx v. Herman*, 8 Lea, 683; *Turner v. Turner*, 1 Pickle, 387).

This duty imposed upon him is all the more imperative because of the rule of this Court that after a verdict which has met the approval of the Circuit Judge, this Court will not reverse if there is any evidence to sustain it. See cases cited, and *Jones v. Jennings*, 10 Hum., 428; *Dodge v. Brittain*, Meigs, 85; *Pettitt v. Pettitt*, 4 Hum., 191; *Walker v. Galbreath*, 3 Head, 315.

And this always has been the rule, both before and since the case of *Nance v. Haney*, 1 Heis., 177, although in that case the Judge delivering the opinion criticized the language used on this point in some of the cases cited, and used instead

the terms "great preponderance of evidence against the verdict so that the Court can see clearly that the judgment of the law upon all the facts shown in the evidence is not that which the jury has found." This language as well as that in other cases was quoted, and no distinction drawn between the cases in *Morris v. Swaney*, 7 Heis., 602.

We have since repeatedly held that there was no distinction in cases where there was such a great or overwhelming preponderance of evidence against a verdict that the Court could *clearly see* that it was erroneous, and one where there was not any legitimate evidence to sustain it. For if there is legitimate evidence to sustain it, passed upon by the jury and Circuit Judge, we cannot *clearly see* that the verdict is wrong. We have therefore held that no difference in language used has made a difference in the rule, which ever was, and still remains, that this Court will not disturb such verdict if there is any legitimate evidence to sustain it. 1 Heis., 359; 10 Lea, 470; 1 Pickle, 389.

But while it was the duty of the Circuit Judge, upon a view of the evidence conflicting with that of the jury, to set the verdict aside, it is obvious that if there was no limit upon this power no verdict would ever stand, and of necessity there must be some way to end the case, notwithstanding such conflict of opinion. This Act was intended to settle it, and, in favor of the correctness of the conclusions of the three juries, to give to the verdict of the third, upon evidence

Railway Company v. Mahoney, Adm'x.

which in any proper aspect could sustain it, such weight that it could not be disturbed because different from that which the Judge would have deemed proper and approved on the weight of the evidence.

The question of difference in opinion had to be provided for and settled in some way. This is perhaps the best and least objectionable in which it could have been done. At all events it was within legislative power, and violated no provision of the Constitution, State or Federal.

The judgment upon this verdict cannot, therefore, on this assignment, be disturbed, and it must be affirmed with cost.

Adams v. Sharon.

ADAMS v. SHARON.

(*Knoxville*. November 1, 1890.)

SUPREME COURT PRACTICE. *Rehearing.*

Petition for rehearing will not be entertained by this Court where it was not presented to the Court within ten days after the opinion upon the original hearing was rendered. Merely filing the petition in the Clerk's office without motion, and without notice to the Court or adversary counsel, is ineffectual.

Rule construed: Rule 17, 85 Tenn., 755.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
W. H. DEWITT, Sp. Ch.

WHEELER & MARSHALL for Adams.

COOKE, SWEENEY & FRAZIER for Sharon.

J. A. CALDWELL for Caldwell.

TURNER, Ch. J. This cause was heard at the present term. Decree was entered on October 14. There is a petition to rehear, marked "filed October 23, 1890." No motion to file said petition was made to the Court, and no notice that it had

been filed until October 30. No notice has been given to adversary counsel.

Section 17 of the Rules, 1 Pickle, 755, directs:

"Petitions for rehearing, before being presented to the Court, will be furnished to opposite counsel; and after both sides have prepared briefs, the record, together with the petition and briefs, will be presented to the Court without argument.

* * * But petitions for rehearing *must in all cases be presented to the Court within ten days* after the opinion in the case which is sought to be re-examined," etc.

This petition is presented sixteen days after decree was entered, which may have been several days after the opinion. As we have seen, the rule is violated in nearly or quite all other respects.

Petition dismissed with costs.

The J. I. Case Company v. Joyce.

THE J. I. CASE COMPANY v. JOYCE.

89 337
110 460.

(Knoxville. November 5, 1890.)

1. HOMESTEAD. *Undivided interest in land not subject to.*

Homestead does not attach to undivided interests in lands, even since Act of 1879; and therefore the husband, who is head of a family, may convey such interests without the wife's joinder in his deed.

Constitution construed: Art. XI., Sec. 11.

Acts construed: Acts of 1870, Ch. 80; Acts of 1879, Ch. 171.

Cases cited and approved: *Avans v. Everett*, 3 Lea, 76; *Flatt v. Mack Stadler & Co.*, 16 Lea, 371-379; *Chalfant v. Grant*, 3 Lea, 118; *Spiro v. Paxton*, 3 Lea, 75; *Gill v. Latimore*, 9 Lea, 381; *Hollins v. Webb*, 2 Leg. R., 74.

2. STARE DECISIS. *Case for its application.*

A decision of this Court which for eleven years has constituted a rule of property of frequent application affecting titles to real estate, should be adhered to after repeated recognitions by this and the other Courts of the State, regardless of whether it was originally correct or incorrect.

Cases cited and approved: *Sherfy v. Argenbright*, 1 Heis., 143, 144; *Atkinson v. Dance*, 9 Yer., 427; *Thompson v. Watson*, 10 Yer., 368; *Smith v. McCall*, 2 Hum., 163-166.

FROM GRAINGER.

Appeal from Chancery Court of Grainger County.
JOHN P. SMITH, Ch.

G. MC. HENDERSON and INGERSOLL & PEYTON for
Complainant.

The J. I. Case Company v. Joyce.

J. T. & J. K. SHIELDS, and R. C. SAMSELL for Respondents.

SNODGRASS, J. We agree with the Chancellor in the conclusions reached in this case as to Joyce, and do not deem it necessary to discuss the assignments of error as to his branch of the case further than the point made that the Chancellor was in error in holding that Joyce was not entitled to homestead in the land decreed to be sold, because his interest in it was that of a tenant in common. His decree was upon the authority of *Avans v. Everett*, 3 Lea, 76, decided in September, 1879, but decided under the Act of 1870, and it is earnestly and ably argued—first, that this case was originally wrong; and, second, that under our present homestead law, embodying the amendment of 1879, a homestead does exist on the undivided interest of a tenant in common in “real estate;” that these words are broad and comprehensive enough to include any interest in real estate and exempt it.

The argument is put upon the ground that our present homestead law, in consequence of the use of the term “real estate belonging to each head of a family” now included in the law by virtue of the Act of 1879, exempts the interest of a tenant in common, because, according to Kent and all other authors who ever treated of that subject, “real estate” includes the interest of a tenant in common, joint tenant, or any other interest inland.

If that were the question being considered, there would be no controversy, as there could be no debate. As no one ever did deny that proposition, it is fair to presume that no one ever will. If the Legislature of 1879 intended to protect "real estate" as such, the question was settled in 1879 and before the delivery of the opinion in *Avans v. Everett*. But the error of the argument results from treating the Legislature as intending to protect any interest in real estate as such, and ignoring the fact that this was not (and has been construed as not) to protect real estate at all, or any interest in it, but was and was alone to exempt a homestead (a right of occupancy upon such real estate as was owned by a head of a family, which he had converted, or was in a situation to convert and occupy as a homestead should he wish to do so). Because, before 1879, it had been necessary that real estate which was possessed by a head of a family for a home must be occupied in order to give him the homestead right, the law was then so amended as to secure a debtor a homestead in land not thus occupied, but such as he might select and appropriate to that purpose when he desired. It was intended to protect that occupied as a homestead, or owned by him in such a way that he could appropriate it as such; and of course it either must have been, or been in his hands susceptible of being, so converted into a homestead—that is, he must have had it in his exclusive possession,

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or it must have been owned by him in severalty and in a condition to be so claimed, used, and appropriated, whether the estate be legal or equitable or a leasehold.

That this Act did not exempt real estate as such, or any interest in it, has been since very often adjudged and the Act held to have no extending or other effect on the law as it stood, and as an amendment, than to exempt a right of occupancy (a homestead) in real estate which was occupied or might be occupied as a home.

The use of the words "or real estate" was originally supposed by some members of the profession to exempt land, or some interest in it, and the question was soon made, but this Court repudiated that view, and held that the Act added nothing to the old law but an exemption of possession on a thousand dollars' worth of land owned by the debtor, but which he did not actually occupy, and gave him the right to select the part of his land upon which the homestead should be located and thereafter exist. *Flatt v. Mack Stadler & Co.*, 16 Lea, 371-379.

This case goes over the whole subject, and concludes as follows: "The whole of the Acts upon this subject should be construed together as one Act, and if there is any seeming conflict, it should be so construed as to give effect to the will of the law-making power. But we think there is no real conflict in the object and design of the several statutes, nor any purpose by the Act of

1879 to alter the then existing law further than to give the owner of the land the power to locate his homestead upon any part of it."

This opinion was at the April Term, 1886, and has ever since been followed. And see 13 Lea, 622.

This ends all argument upon the broad or comprehensive terms of the statute. It includes no more than it did before the Act of 1879, so far as interests in land are concerned, and leaves the question unembarrassed by any play upon phraseology or speculation in familiar or foreign law.

The law is just as it was when *Avans v. Everett* was decided, and the first question to be investigated is, Was that case right?

In the first place, we remark it is evidently well considered. On its face it appears to be the unanimous opinion of the Court, but we personally know that our present Chief Justice did not concur. This, however, only shows that it was better considered; because the dissenting view, we need not add, was pressed, and, after all that could be urged in argument or consultation, was rejected, and the case decided as it was against the exemption.

In the next place, it was in accordance with the holding of numerous Courts in many of the States, some of them of the very highest rank in the estimation of the bar throughout the Union. It was so decided in Massachusetts, California, Wisconsin, and other States.

A number of references to these opinions, and much quotation from them, can be found in Thompson on Homesteads and Exemptions, Sections 182 to 185 inclusive. They need not be restated or requoted here.

Some of the other States had taken the contrary view. The author of that work advocated the contrary view. He even believed that the exemption extended to partnership realty, but admits, of course, what was not to be denied—that “the Courts have by a very decided weight of authority settled the question” against his view. Sec. 194.

It is needless to add that the Court of this State has so settled it. *Chalfant, Cox & Co. v. Grant*, 3 Lea, 118; *Spiro v. Paxton*, 3 Lea, 75; *Gill v. Latimore*, 9 Lea, 381; *Hollins, Burton & Co. v. Webb*, 2 Leg. R., 74.

Judge Cooper, who delivered the opinion of the Court in *Avans v. Everett*, cites the sections referred to herein from Thompson on Homesteads and Exemptions to sustain, and in opposition to the view we have taken, and says the weight of authority under similar statutes is in accord with the conclusions of the Court in that case.

He quotes our statute, and says: “It manifestly contemplates the occupancy of a specific portion of land capable of being set apart by metes and bounds. It is impossible to apply its provisions to an undivided interest in realty. The debtor owns nothing in severalty, and the creditor could neither ascertain nor, of course, subject the re-

mainder after setting apart the homestead. Until the Legislature changes the provision of the law, or makes specific provisions for the case, we see no mode of conceding the homestead right consistently with the equally declared rights of creditors." Page 78.

This was at the September Term, 1879. The Court then, at that date, assuming that the weight of authority was already with this conclusion, added to it the precedent then made in Tennessee, and thus added this State to the list of those in which it was held that the interest of a tenant in common was not exempt under the homestead law. For seven years that Court recognized and followed the precedent then established, and for four years this Court has done so. We are now urged to reverse it, and the authority rejected by the Court in the 3 Lea case referred to is pressed upon us as conclusive on the other side of the question. In deciding that case the Court referred to the sections of Thompson on Homesteads and Exemptions (Sections 180 *et seq.*), embodying both views, and disagreed with the author of that work as to the weight of authority.

Among the sections thus cited and rejected was one quoted by Thompson from Freeman on Co-tenancy and Partition and other works of same author, saying that "a co-tenant may lawfully occupy every parcel of the lands of the co-tenancy, and may employ them not merely for cultivation or for other means of making profits, but may also build

houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land of which he is but a part owner he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has."

This seems to be the stronghold of that side of the case—of the theory that the exemption of a home to the head of a family does not mean his home, exclusively his, but means that it exempts any interest which he is authorized to possess with others, although he cannot claim any distinct parcel of it as his own for a home or any other purpose, and this, too, upon the idea that he can go on any part of it, and may jointly with others use the land, and may himself improve and beautify any part or all of it. It seems that this has so little to do with the question under our statute giving a homestead to him alone who owns the home or the real estate in such way that it, or a certain part of it, can at any time be set aside to him against everybody, by three freeholders summoned by a Sheriff or Constable for that purpose only, that it would not be

seriously cited on such question, and only needs statement, not refutation.

It may be true that a co-tenant can plant shrubs and flowers in a co-tenancy, while his defrauded or defeated creditor grows weeds adjacent in a rented homestead, but surely this does not make the property so adorned the home of the debtor in the sense of our homestead law, nor is there any thing in our partition law that necessarily gives to any co-tenant the portion he elects to take or beautify. The homestead which our law contemplates is a specific parcel of land owned by him, and capable, not of being partitioned in a suit in Court, but of being partitioned and set apart by metes and bounds by the three freeholders summoned by the levying officer. See 3 Lea, 78, and see for further elaboration of this question the dissenting opinion in the case of *Jackson, Orr & Co. v. G. W. Shelton et al.*, ante, p. 82.

An argument is made that because land can be partitioned among tenants in common on application to the Courts of this State, therefore a homestead exists in favor of each one, and can be set apart to him. This is erroneous for several reasons. In the first place, all land or real estate held in such tenancy cannot be partitioned. A hundred tenants in common may own one small house or small tract incapable of being divided, much less making a homestead for each; and if this is answered that each interest might be sold

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and separate proceeds invested, we reply that this would be impossible' of small interests. Suppose the interests to bring only a few dollars each; it would be totally impracticable to take each small sum and invest it in a homestead, and let the creditor sell the fee, for it is only a homestead interest in land thus bought on re-investment that is protected; the fee is to be subjected to the creditor's demand.

But it is useless to discuss our partition law. The homestead law has nothing to do with it. The homestead law has a partition method of its own. It declares that land on which such an estate of occupancy exists is one which can be and must be partitioned or sold under the action and certificate of three freeholders summoned by the levying officer, and it follows that land which cannot be so partitioned is not included. This is the argument, and it is not answered by a reply that land may be partitioned in Court in this State—a true enough proposition in itself, but having nothing to do with the question.

But if we could apply by amendment our partition law to create a homestead, the argument is (as we have already seen) vicious, because all land cannot be partitioned. There are often dozens—sometimes hundreds—of tenants in common to whom one homestead descends. It could not have been contemplated that each would be thus split up into dozens.

Before leaving the merits of the question, it is

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proper to add a word respecting the sophistry of the statement quoted from Mr. Freeman, "that because a co-tenant has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has." To make of this rhetoric a plain sentence, it reads: "Because the defendant has not a whole homestead is a very unsatisfactory reason for declaring that he has not a homestead." It would seem to follow, as a matter of course, that if he has not a homestead, the Court does not deprive him of any thing by saying he has not. It is neither unsatisfactory nor inhumane. On the contrary, the policy of disencumbering his small interest or large one held in common with others of the restraint against alienation which the homestead law imposes, is to his advantage, and to the general advantage, as it leaves the property free in his hands for conveyance and for credit. Nor is it inhumane to allow it to be taken in satisfaction of his debts. If he is in debt, it is because some one has trusted him, and he has received an equal value in money or other property to that which can be taken. The creditor is not to be treated as a hostile enemy who is robbing him. He too may want a home, and often would have had one could he have received his due. He may have a wife and children likewise in need. He but demands a fair show before the law to collect his debt and enable himself to acquire home and comforts, but no sentiment is wasted on him.

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Whatever may be the condition to which he and his are reduced by the default of the debtor, his rights are forgotten in such sentimentality as we have quoted. But they are nevertheless as dear to him, and should be as sacred to the Courts. The loss of a real homestead is after all no extraordinary grievance. The loser is still as well off as thousands of other good men, who pay what they owe and live in rented houses. A man who yields it up to pay his honest debts, plants a flower in his rented lawn that will bloom while he lives as a token of honor, and shed a fragrance above his grave when he is gone that will endure forever. It will be a treasure to his children and children's children when the shrubs he might have planted in a co-tenancy, which he was able to keep only by allowing his debts to remain unpaid, would have decayed by lapse of time and been blown away in the revilings of those he defeated or defrauded of justice by refusing to render them their own.

Leaving the question of right, we come to the second inquiry contemplated in this opinion, and that is whether this case should be overruled as a matter of judicial policy, having tried to establish that it should not be as a matter of judicial right. Ordinarily a case which is doubtful may be examined and reviewed even after many years, but it should not be done unless clearly wrong, and the public good is to be subserved by overruling it. It is better that the law should be fixed and

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certain rather than approximately perfect. The change of ruling on any point is more or less evil. Often done, every thing becomes doubtful; none can advise or act with certainty or security. But where great evils cannot flow from reversal of former rulings, it is of course the duty of the Courts to reverse and follow a better and wiser policy in exceptional cases. The contrary is true respecting cases which have become rules of property, and under which estates have been established, and where land titles depend on the former construction. In such case it is said, "when a decision or a series of decisions has established a rule of property, and more particularly a rule affecting title to real estate which has become generally known and been acted upon, such a landmark should not be disturbed." *Sherfy v. Argenbright*, 1 Heis., 143, 144; and see 8 Yer., 180; 9 Yer., 427; 10 Yer., 368; 2 Hum., 163-166.

Here we have a ruling made eleven years ago, and during the intervening time again and again repeated and confirmed. Lawyers have advised their clients they could safely buy and sell these interests of tenants in common. Hundreds of sales on executions and attachments, as well as private sales, have been made. The change of ruling on that question now would destroy them all. Any person, *sui juris*, might sue to reclaim homestead in such interests sold at public sale within the last seven years or longer if possession was not taken and adversely held by the vendees

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for that period. Many such suits would be maintainable where the sales were private, while in cases of persons under disability (no lapse of time affecting their rights), suits to recover such interests sold, either at public sale under process or privately, where the wife did not join in conveying the homestead, would be maintainable, and thus we would unsettle and destroy all estates so created.

It is not the case, as put in argument for the contrary ruling, that if many have lost their property by an erroneous construction, more need not do so. This ignores the real question we have just stated. If the change, that more might not be injured, was the question, change would be praiseworthy; but that is not the question. It is whether we should, by one fell stroke, destroy titles already vested and lands improved under a former construction, for the fancied good of saving future losses.

There is no policy and less necessity for such change of construction. Everybody has acquiesced in the one given in 1879. Judge Cooper pointed out to the Legislature the situation, and called attention to the fact that additional legislation was necessary if it was desired to exempt real estate held in co-tenancy. Five sessions of the Legislature have since followed, and no change deemed wise or desirable. Nobody has demanded such change, and none has been made—no effort by anybody to disturb the law in that respect. It

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thus appears to have met universal approbation. Credit has been received and extended on the faith of it. The effect has been far-reaching in the change of titles and its influence on property rights and management. It is now within three months of the meeting of the next Legislature, when the evil—if such it be—for the future can be corrected without disturbing the settled transactions of the past, and it would be inexcusable for us at this time to precipitate this wide flood of trouble by a change of construction of this law. Every reason of right and policy constrains us to adhere to it and to affirm the decree of the Chancellor on this point.

We think, however, he was in error in holding Defendant Jones liable to complainant, and as to him the decree is reversed.

The cost of this Court will be divided between complainant and Defendant Joyce; that of the Court below will be paid as decreed by the Chancellor.

DISSENTING OPINION.

CALDWELL, J. To secure the debt sued on, Joyce mortgaged his interest in two tracts of land. That interest being an undivided one-half in one tract, and an undivided one-fourth in the other tract. Joyce and his wife now reside on the former tract, and have lived upon it as their home for

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many years. The wife did not join Joyce in the execution of the mortgage. On that ground he defends this bill to foreclose, and claims homestead for himself and family in the mortgaged lands. The Chancellor denied them that right, and decreed the sale of the lands. His decree is affirmed by a majority of this Court.

In denying Joyce and his family the right of homestead, Chief Justice Turney and the writer cannot agree with the majority.

The Constitution and the statute declare that the homestead shall not be alienated without the joint conveyance of the husband and wife, where that relation exists. Con., Art. XI., § 11; Code (M. & V.), § 2935.

Therefore, when the husband attempts to convey the homestead without the joint conveyance of the wife, as in this case, his deed is ineffectual to pass the homestead right as to either of them, and will only vest the grantee with the husband's interest in reversion, expectant on the termination of the homestead right. *Marsh v. Russell*, 1 Lea, 543; *Kennedy v. Stacy*, 1 Bax., 225; *Hoge v. Hollister*, 2 Tenn. Ch., 612.

It follows that if the right of homestead existed in favor of Joyce in those lands *before* the execution of the mortgage, it still exists, and should be allowed. But it is held by the majority that the right did not exist in the first instance, because Joyce did not own the lands in severalty, but only as a tenant in common with others.

Chief Justice Turney and the writer do not think this construction of the homestead law justified, either by its letter or spirit. The wise and humane object of that law is to secure the shelter, the comfort, and the independence of *a home*, of limited value, to the family of all citizens who may own an estate or interest in land capable of being in any way applied, used, or enjoyed as a home.

The words of the statute are broad and comprehensive. The property around which the benefits of the exemption are thrown, is described as "a homestead, or *real estate*, in the possession of, or belonging to, each head of a family" (Code, § 2935), whether the owner's estate therein be "legal" or "equitable" or "leasehold" (Code, §§ 2937, 2938); and "each head of a family owning *real estate* shall have the right to elect where the homestead or said exemption shall be set apart, whether living on the same or not." Code, § 2936.

It is not easy to conceive how more plain and appropriate terms could have been used to embrace every kind and character of estate in lands. The term *real estate* means an estate in fee or for life in lands, and is used as synonymous with lands and tenements. 3 Kent, *401; 1 Wash. R. P., *45.

Unmistakably it embraces estates in fee owned by tenants in common, as well as estates in fee held in severalty. The statute makes no distinction. It includes all estates in land, and excludes none.

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Estates of co-tenancy are very common in this State. They are created by our law of descent, whenever an owner of land dies intestate, leaving children, grandchildren, etc. Such estates existed when the homestead provision was incorporated into the Constitution and statute law of the State; and, being so clearly within the object and language of that provision, they must have been in the contemplation of the law-makers, and by them deemed subject to the exemption provided.

In the absence of an express declaration to that effect, we could not believe that any law-making power ever intended to extend the benefit of such an exemption to citizens owning real estate in severalty and not to those owning undivided interests as tenants in common. A law making such a distinction would, in our judgment, be both impolitic and unjust. It would be an unjustifiable discrimination in favor of some persons and against others, though alike deserving of the law's favor and protection.

Such is not our law, which, as we understand it, is distinctly *impartial*, extending the right of exemption to "each head of a family owning *real estate*," whether in fee, for life, for years, in severalty, in joint tenancy, or tenancy in common.

In *Arnold v. Jones*, 9 Lea, 548, it was decided that the right of homestead exemption existed in favor of a life tenant, the Court saying:

"If the homestead, the place of residence and home of the family, is protected where the head

of the family owns the fee, much more, it seems, it ought to be in favor of the poorer man, who has only an estate less valuable, liable to be determined at any time by his death."

It was also decided in *Jackson, Orr & Co. v. G. W. Shelton and wife*, ante, p. 82, that the right of homestead existed in a house and lot owned by husband and wife jointly as tenants by entireties. In the latter case, after holding that the comprehensive and unrestricted words "real estate" should be interpreted according to their ordinary legal meaning, the Court said:

"The nature of the estate, or extent of the title of the beneficiary, was not of the essence of the scheme. The purpose was to stay the hand of the creditor as against a limited amount, in value, of real estate, of *whatever character*, belonging to any citizen who should be the head of a family. * * . Why not include the head of a family who owns land as tenant by entirety with his wife in the scope of a law whose purpose is so humane and commendable? To the extent of his interest he can use the land for the shelter, support, and benefit of his family in the same manner as could another man owning the absolute fee. He stands in the same or greater need of the law's favor. Is he any the less deserving of protection because he does not own the whole estate? Or is the officer of the law to take what he has because he has not more? Manifestly not. The protection of such an interest is

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clearly within the spirit and letter of the statute. We can conceive no satisfactory reason why the Legislature should not have intended to embrace in this wholesome provision *all present interests in land* naturally embraced in the language used in the Act."

An eminent text-writer says: "The homestead laws have an object perfectly well understood, and in the promotion of which Courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and the influence of home. A co-tenant may lawfully occupy every parcel of the lands of the co-tenancy. He may employ them not merely for cultivation, or for other means of making profit, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may, of right, occupy and enjoy the premises with him. Upon the land of which he is but a part owner, he may, and in fact frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity, because the other co-tenants are entitled to equal advantages in the same home. That he has not the whole is a very unsatisfactory and a very inhumane reason for depriving him of that which he has." Freeman on Ex., Sec. 243.

To this view Mr. Thompson lends the weight

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of his opinion. Thompson on H. and E., Secs. 181 and 188.

It is said, in substance, by the majority that estates of co-tenancy must be excluded from the exemption because no particular mode for the assignment of the homestead in lands held by co-tenants is expressly prescribed. To this we say the general provisions on this subject, as contained in §§ 2940, 2941, and 2944 of the Code, in connection with those then and now existing in Code, §§ 3993 and 4024, on the subject of partition and sale for division, afford the amplest direction and remedy for the allotment of homestead *in every case*, whether the claimant have an estate in severalty or in co-tenancy with others. Hence, in the absence of an express exclusion of co-tenants from the benefits of a law whose terms are so broad and whose purpose is so general, we think they should be held to be included. In our opinion it is a harsh and unwise construction that excludes such persons from the beneficial operation of a law whose provisions are, in express terms, for the advantage of "each head of a family owning real estate." Such a rule of interpretation should not be applied in this case; for the Courts, almost universally, indulge a liberal construction in favor of the right of homestead. Thompson on H. and E., Secs. 4, 7, 731; 11 Heis., 520; 9 Lea, 548; 3 Pickle, 284; *Jackson, Orr & Co. v. G. W. Shelton & wife*, ante, p. 82.

This liberality of construction extends as well

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to the assignment of homestead as to the ascertainment of the existence of the right. By the indulgence of such rule of construction, the Courts will readily find in existing statutes all necessary means for the assignment of homestead in lands held by tenants in common. In the case before us the complainant would only have to bring the other co-tenants before the Court and have the lands partitioned in kind, if that could be done; and, if not, have them sold for division of proceeds. The interest of the debtor being thus separated from that of others, the creditor and debtor could each be protected by decree in conformity to the statute.

This might be some inconvenience to the creditor, but mere inconvenience in the assignment of homestead should not be allowed to defeat the right of exemption itself. No mere matter of inconvenience in the administration of a law can operate to its annulment. Yet, the reasons given for denying the right, by the Courts of those States which hold that homestead is not allowable in cases of co-tenancy, are reasons of convenience merely. Thompson on H. and E., Sec. 183.

The majority opinion follows the case of *Arans v. Everett*, 3 Lea, 76. But, not agreeing to the reasoning or conclusion in that case, we think it should now be overruled as contrary to the manifest purpose and plain language of the constitutional and statutory provisions for the exemption of a homestead to "each head of a family owning real estate."

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The reasoning of the Court in that case is found in the following extract from the opinion: "The statute manifestly contemplates the occupancy of a specific portion of land capable of being set apart by metes and bounds. It is impossible to apply its provisions to an undivided interest in realty. The debtor owns nothing in severalty, and the creditor can neither ascertain nor, of course, subject the remainder after setting apart the homestead." 3 Lea, 78.

To our minds the difficulty of applying those "provisions to an undivided interest in realty" is entirely removed by the statute of partition, under which one co-tenant's interest may be ascertained and separated from that of other co-tenants, either by partition in kind or by a sale of the whole land for a division of proceeds. By this means the rights of both creditor and debtor may be amply protected, while by the doctrine of that case those of the debtor are entirely destroyed and those of the creditor augmented.

The importance of uniformity and stability in judicial decisions can scarcely be exaggerated. Nevertheless, when it appears that a decision has departed from the plain mandate of the Constitution and the statute, as we believe to be true of that case, it should be overruled, and not longer followed. A decision which misinterprets a law, and renders a provision which is just and impartial in its terms both partial and unjust in its administration, as we think that one does, should be de-

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parted from whenever the mistake is discovered. That many debtors have lost their homesteads under the doctrine of that case, and that reparation cannot now be made, are not sound reasons for its perpetuation, and for forcing others to undergo a like deprivation in the future.

We think that case should now be overruled, and that Joyce and family should not be driven from a place that has afforded them the shelter, comfort, and independence of a *home* so long.

Turney, Ch. J., concurs in the dissent.

Byous v. Mount.

BYOUS v. MOUNT.

(Knoxville. November 5, 1890.)

1. EXEMPTIONS. *Of pork and stock hogs from execution.*

B., the head of a family of more than six persons, was engaged in agriculture, and in the month of July owned two open sows, weighing seventy-five pounds each, twelve pigs weighing eighteen or nineteen pounds each, six shoats—barrows and spayed sows—weighing eighty pounds each, and fifteen pounds of bacon.

Held: That none of this property was subject to levy under execution.

The two open sows and eight of the pigs are protected by the exemption of "ten head of stock hogs" to each head of a family "engaged in agriculture." The six shoats and four remaining pigs, and the fifteen pounds of bacon, are protected by the exemption to each head of a family of more than six persons of 1,200 pounds of pork, "slaughtered or on foot," or 900 pounds of bacon.

Code construed: §§ 2931, 2932 (M. & V.)—Acts of 1870-71, Ch. 71.

2. SAME. *In the alternative.*

Where the exemption is in the alternative—as, of 1,200 pounds of pork or 900 pounds of bacon—the debtor may take both pork and bacon, but the aggregate of both, when reduced to the value of either, must not exceed the amount given by the statute.

3. SAME. *What are "stock hogs."*

"Stock hogs," within the meaning of the exemption laws, are such as are capable of reproduction, and do not therefore include barrows and spayed sows.

4. SAME. *What is pork "on foot."*

Pork "on foot," within the meaning of the exemption laws, includes hogs of all sizes and condition at all seasons of the year, which may, "in due season and at the convenience of the debtor, be prepared for and converted into pork."

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5. SAME. *Statute creating liberally construed.*

Doctrine re-affirmed that statutes ~~creating~~ exemptions from execution are liberally construed in favor of the debtor ~~class~~.

Cases cited and approved: Wolfenbarger v. Standifer, 3 Sneed, 659; Richardson v. Duncan, 2 Heis., 220; Webb v. Brandon, 4 Heis., 285; Pyett v. Rhea, 6 Heis., 137; Simons v. Lovell, 7 Heis., 514.

FROM SEVIER.

Appeal in error from Circuit Court of Sevier County. W. R. HICKS, J.

M. B. McMAHAN, W. R. TURNER, and G. W. PICKLE for Byous.

J. R. PENLAND for Mount.

CALDWELL, J. Byous is a farmer, residing in Sevier County. He is the head of a family, having a wife and five minor children living with him.

July 26, 1889, he owned twenty hogs, as follows: Two open brood-sows, weighing seventy-five pounds each; twelve small pigs, weighing eighteen or nineteen pounds each; and six shoats, spayed sows, and barrows, weighing eighty pounds each, on an average. He owned no other hogs, had no slaughtered pork, and only fifteen pounds of bacon.

On the day mentioned a Constable, having an

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execution for a small sum against Byous, levied on one of the open sows, three of the small pigs, and three of the shoats. Byous claimed all his hogs as exempt property, and protested against the seizure by the officer. After the levy was made he instituted this action of replevin before a Justice of the Peace to recover the possession of the hogs levied on from the Constable. Being unsuccessful before the Magistrate, Byous appealed to the Circuit Court. The case was there tried by the Circuit Judge without a jury, and judgment was again rendered against Byous. He then appealed in error to this Court, and assigned errors.

Were the hogs seized by the Constable exempt from execution? Section 2932 of the Code (M. & V.) provides that "ten head of stock hogs" shall be exempt in the hands of each head of a family "engaged in agriculture." Under this provision Byous was clearly entitled to the two brood-sows and eight of the small pigs as exempt. None of the shoats were exempt under this provision, because they were not "stock hogs," being spayed sows and barrows, and therefore incapable of reproduction.

Section 2931 of the Code provides that 1,200 pounds of pork, "slaughtered or on foot," or 900 pounds of bacon, shall be exempt in the hands of each head of a family consisting of more than six persons. By this provision Byous was manifestly authorized to claim an exemption of all the other hogs. He had only fifteen pounds of bacon

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and no slaughtered pork. Since each family consisting of more than six persons, is entitled to an exemption of 900 pounds of bacon or 1,200 pounds of pork, three pounds of bacon are to be treated as the equivalent of four pounds of pork. The family may claim both bacon and pork, some of one and some of the other, so that the aggregate does not exceed the maximum mentioned in the statute, due regard being observed for the comparative value of each as just stated. To illustrate: The full exemption may be 450 pounds of bacon and 600 pounds of pork, or 300 pounds of bacon and 800 pounds of pork, or 600 pounds of bacon and 400 pounds of pork.

The fifteen pounds of bacon on hand in this case may be treated as the equivalent of twenty pounds of pork, and thus it is ascertained that Byous was entitled to an exemption of 1,180 pounds of pork, slaughtered or on foot, if he had owned so much. In fact, the six shoats and four pigs that we hold he was entitled to claim, weighed, at the time of the levy, only 552 pounds to 556 pounds.

It is true that these shoats and pigs were not then of the most profitable sizes, or in the best condition of flesh to be slaughtered, and that the usual season for slaughtering and packing pork, in this climate, was not then at hand; yet, these are immaterial circumstances so far as the legal right of exemption is concerned.

After reserving the stock hogs allowed him,

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these ten were all the debtor was fortunate enough to have left for pork. Six of them had been set apart for that purpose, by spaying the females and castrating the males, and in due season they would be ready for the slaughter-pen. The other four, though smaller and of less value, could nevertheless be made of service in contributing a share to the supply of food for the debtor's family. To all of them, the shoats and pigs, Byous had the same right of exemption that his neighbor had to hogs of better size and better condition; to them he had the same right of exemption in July that he would have had to larger and well-fatted hogs in November or December. The designation, *pork on foot*, as used in the exemption statute, embraces hogs that may, in due season and at the convenience of the debtor, be prepared for and converted into pork, as well as those that may be ready for the knife at the time the officer appears with his execution or attachment.

The statute does not declare, directly or indirectly, that the exemption shall apply only to hogs of a particular size and condition, and at a particular season of the year. The provision is general, and should be liberally construed in favor of the debtor. Such is the general rule in the construction of exemption statutes. 3 Sneed, 659; 2 Heis., 220; 4 Heis., 285; 6 Heis., 137; 7 Heis., 514.

To hold that hogs are exempt as pork only when they can be slaughtered to the best advan-

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tage, would be to defeat the statute entirely in the majority of cases. Such a narrow and unwise construction this Court is unwilling to adopt.

Byous makes out a complete case of exemption. For the failure of the trial Judge to so hold, we reverse his judgment.

The case having been tried by the Circuit Judge without the intervention of a jury, this Court, under a familiar rule of practice, will render the judgment he should have rendered.

Reverse and enter judgment here in favor of Byous, taxing Mount with all costs.

Maupin v. State.

MAUPIN v. STATE.

(*Knoxville*. November 5, 1890.)

CARRYING ARMS. *Facts that sustain conviction for.*

Conviction for unlawfully carrying arms is fully sustained by proof that defendant, while regularly engaged in tending a mill at which he ate and slept, carried a pocket-pistol upon his person with intent to go armed while at his ordinary work in the mill-house.

FROM WASHINGTON.

Appeal in error from Circuit Court of Washington County. A. J. BROWN, J.

I. E. REEVES and NEWTON HACKER for Maupin.

Attorney-general PICKLE for State.

CALDWELL, J. John P. Maupin was convicted on a presentment for carrying arms unlawfully. He has appealed in error.

The contention of his counsel is that the verdict is not supported by the evidence, and on that ground alone reversal and new trial are sought.

Only three witnesses testified before the jury: William Curtis for the State, and — Maupin and the defendant for the defense. Curtis stated, in substance, that he was at the grist-mill of the

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defendant a short time before the finding of the presentment; that the defendant proposed to sell him some furniture then in the mill; that while "leaning over" showing witness the furniture the defendant dropped a pocket-pistol from some part of his person on the floor at their feet; that the defendant picked up that pistol and looked at it, and then pulled another pocket-pistol from his pocket, telling witness at the time that "some parties had threatened him, and that he had prepared to defend himself." This witness further stated that defendant operated the mill himself; that he "both ate and slept" in the mill; and, finally, that witness "did not see defendant have either of the pistols on the outside of the mill."

The defendant stated substantially the same facts, except that he testified he did not have either of the pistols concealed on his person, but that the one which dropped on the floor fell from the flour chest near by, and that he took the other one from a shelf in the mill, and not from his pocket. The defendant further said: "I lived about one-half mile from the mill. When I would go home I never took the pistols with me."

None but these two were present on the occasion mentioned by them. The other witness said he had frequently been "in the mill while defendant was tending it," and that he had frequently seen defendant's two pistols "lying on the shelves in the mill."

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Such is the evidence in the case. The only conflict is with respect to the place at which defendant had the pistols—whether concealed about his person, as stated by Curtis, or on the chest and shelf, as stated by the defendant.

The jury saw fit to believe the statement of Curtis, and in that we think they were right. So far as can be seen from this record, he is entitled to the fullest credit. He is disinterested and unimpeached, while the defendant is, of course, as much interested as a witness could be in such a case.

Then, the question is whether the testimony of Curtis makes out the case, whether it is a violation of law for a man to carry pocket-pistols about his person while inside the walls of a grist-mill and engaged in its operation.

We think the case is well made out; that the defendant's conduct was a manifest violation of the statute against carrying weapons. The mill was a public place, a place to which customers were constantly invited and daily expected to go. In such a place a man, though he be the proprietor, may not lawfully carry pistols concealed about his person. That the defendant had been "threatened," that he "ate and slept" in the mill, cannot alter the case. There were other means by which he could well have protected himself. The mill was not his home.

Affirm the judgment with costs.

Patton, Adm'r, v. Railway Company.

PATTON, Adm'r, v. RAILWAY COMPANY.

(Knoxville. November 5, 1890.)

1. NEGLIGENCE. *Not proximate cause, when.*

Negligence of railway company that causes separation of the cars of a moving train is not the proximate cause of an injury sustained by a person who subsequently came upon the track in front of, and was struck by, the detached cars, which were moving by impetus and gravitation.

2. RAILWAY COMPANY. *Statutory precautions not applicable to detached cars.*

The statute requiring "the engineer, fireman, or some other person upon the locomotive" of a moving train to be constantly on the lookout "ahead" has no application to the movement by impetus or gravitation of cars detached from the locomotive.

Code construed: § 1298, Subsection 5 (M. & V.); § 1166, Subsection 5 (T. & S.).

3. SAME. *Common law liability. Contributory negligence.*

But upon common law principles a railway company may be held for injury done by detached cars moving upon its track by impetus or gravitation, where it fails in its duty to keep a proper lookout for persons upon the track in front of the cars, or to use all possible means to prevent accident upon discovery of the person. The statute is but a declaration of common law principles. The distinction between cases under the statute and at common law is that contributory negligence may defeat recovery altogether in the latter, but can only mitigate damages in the former.

Cases cited and approved: Railroad v. Fain, 12 Lea, 41; Railroad v. Pratt, 85 Tenn., 13; Railroad v. Foster, 88 Tenn., 672.

4. SAME. *Same. Essential averments in pleadings.*

Where separation of railway train was accidental, a plaintiff seeking to hold the company for injury done by the detached cars, upon the ground that proper lookout for persons upon the track was not kept, must aver that servants of the company were left upon the detached cars, and had had time before the accident to assume proper position

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for observation. The averments in this case are sufficient upon this point.

5. SAME. *Party injured on track treated as trespasser, when. Demurrer.*

Upon demurrer to declaration in suit against railway company for injuries sustained by the plaintiff by collision with a train or cars upon the company's track, he will, in the absence of averment to the contrary, be treated as a trespasser.

6. SAME. *Trespasser's rights.*

The mere fact that a person was a trespasser upon the track of a railway company at the time he was injured by its negligence, does not necessarily constitute a bar to his recovery for the injury. The fact, however, constitutes contributory negligence to be considered by the jury.

Case cited and approved: *Railroad v. Fain*, 12 Lea, 41.

7. SAME. *Trespasser's duty to look and listen.*

It is the duty of a person about to go upon a railway track to look and listen for trains, and to continue to do so while he remains upon the track. The neglect to perform this duty constitutes contributory negligence that may defeat an action by such person for injuries received while upon the track from other negligence than failure of the company to observe the required statutory precautions.

Case cited and approved: 95 U. S., 697.

8. SAME. *Same. Excuse for failure to perform duty.*

The failure of a trespasser upon a railway track to look and listen for trains may be so far excused as to prevent an absolute bar of his suit—but not to exonerate him from contributory negligence, to be considered in mitigation of damages—when he was unexpectedly struck and injured by detached cars moving by impetus and gravitation just in rear of the regular train to which he had surrendered the track and then resumed his journey, and when it appears that he was crossing a bridge, and probably could not have heard the approach of the cars on account of the noise of an adjacent water-fall.

FROM WASHINGTON.

Appeal in error from Circuit Court of Washington County. A. J. BROWN, J.

Patton, Adm'r, v. Railway Company.

DEADERICK & EPPS and NEWTON HACKER for Patton.

W. M. BAXTER and KIRKPATRICK & WILLIAMS for
Railway Company.

LURTON, J. John C. Tipton was killed by collision with a train operated by defendant in error, while walking upon the track. His administrator brought this suit to recover damages for the negligent killing of his intestate. A demurrer was filed to the declaration, and, upon argument, was sustained, and the suit dismissed.

The first count of the declaration, in substance, alleges that the intestate was walking upon the track about one mile west of Telford's Station; that he was overtaken by a train of freight-cars going west, and stepped aside until the train passed, when he returned to the track, and resumed his journey in rear of the train just passed; that while passing over a bridge and water-fall, and unconscious of the approach of another train, he was overtaken and killed by some detached freight-cars which belonged to the train just passed; that the freight-train, while going down grade, had broken in two, and that the rear portion was following the front section by force of gravity at a distance of about two hundred yards; that though there were upon this detached portion servants and employes of the company, there was no one upon the lookout ahead to give warning of the approach of these cars, or to make

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an effort to stop them by putting down the brakes. It charges that intestate was in a position where he could have been seen if there had been any one upon the front end of the detached cars, and that it was negligence not to have some one in such position that a person on the track could have been seen and warned of his danger or the train stopped.

A second count charges that the breaking of the train into two parts was the result of defective machinery and unskillful servants.

The demurrer to the second count was properly sustained. The connection between this accident and the negligence by which this train became broken into two parts is too remote. Such negligence, upon the facts stated, was not the proximate cause of this injury. As observed by counsel for the railway company, "a proximate cause is indicated by a probable result, and not a result extraordinary or which could not have been expected or anticipated."

Does the first count state such a case as entitles plaintiff to go to a jury?

We agree with the learned Circuit Judge in holding that the statutory precautions prescribed by Section 1166, Subsection 5, of the Code do not apply to the movement of detached cars such as those causing this death. The case provided for by the statute is that of a train pulled by a locomotive, and the precautions are those required to be observed by those servants upon the engine,

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and have regard to obstacles on the track in front of or ahead of the engine.

The person required by the Code to be on the lookout is "the engineer, fireman, or some other person upon the locomotive." He is to be on the lookout "ahead"—that is, in the direction in which the engine is moving. The precautions to be observed when any person or obstruction appears on the track are chiefly such as can only be found upon the engine.

It does not at all follow that because the statutory precautions do not apply to the movements of cars detached as these, that therefore the railway company was under no responsibility to take care that in the movement of such cars it did no injury to persons upon its track. The principles of the common law govern in cases not within the purview of the statute.

The first question, then, to be considered is as to the duty of the railway company with reference to the movement of trains or cars having no locomotive in front to warn persons upon its track. Obviously, if a person is *seen* upon the track, and so near as to be apparently in danger, the duty of the company, irrespective of the statute, would be to do all that was possible to prevent an accident, by giving an alarm and stopping the train. And so this Court has frequently said that the common law is only re-enacted by our statute with reference to the duty of the company when a person or obstruction is *seen* on the track. *Knowl-*

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edge of the danger imposes the duty to do all that is possible to stop the train and prevent the accident. *Railroad v. Humphreys*, 12 Lea, 200; *Horne v. Railroad*, 1 Cold., 76; *Railroad v. Pratt*, 85 Tenn., 18.

This much is clear. But it is argued that the declaration does not allege that the intestate was *seen* on the track, and that at the common law the duty to do all that is possible to prevent an accident only arises with reference to a trespasser upon the track when such person is *seen* to be on the track and in danger. Upon this point the declaration charges "that while defendant's servants were upon said detached portion of said train, there was no one on the lookout ahead on the front portion thereof to give plaintiff's intestate warning of its approach, and defendant's employes on said train could have seen the plaintiff's intestate, and ought to have seen him, upon its track." While this is somewhat vague, yet we understand it in substance to charge that there were servants upon these cut-off cars who could have seen plaintiff if they had been on the lookout. When a train is thus broken in two by accident, it ought to appear that, after the breaking of the train, there were servants upon the detached part, and that there was time sufficient for such servants, before the happening of the accident, to have taken such place and position on the front of the detached part, so that the track could be watched ahead. The allegation of the declaration that there

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were servants upon these cars clearly meets the first requisition, and the further allegation that these servants "could have seen the plaintiff's intestate, and ought to have seen him," implies that they were at the time of the accident in such place as to have been able to keep watch over the track.

It is not charged that the deceased was upon the road at a public crossing, nor upon a part of the road commonly used by the public as a walkway, and therefore presumably by license. He must, therefore, be regarded as a trespasser. But it does not follow that this fact will preclude him from an action. "The mere fact that a party is a trespasser," says Judge Cooper in *Railroad v. Fain*, "will not prevent him from recovering for injuries negligently inflicted by another which might have been averted by ordinary and proper prudence on the part of the latter. And, therefore, although a person be injured while unlawfully on the track of a railroad, or while contributing to the injury by his own carelessness or negligence, yet, if the injury might have been avoided by the use of ordinary care and caution by the railroad company, the company will be liable for damages." 12 Lea, 41.

A railway company in the operation of its trains owes a duty even to trespassers without regard to our statute. "The rule is," says Mr. Wood, after a consideration of this subject in the light of the decisions, "that a railway company is bound to

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keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as the circumstances require to prevent injury." 2 Wood's Railway Law, 1267.

Where cars are being moved by gravitation, and therefore with comparatively little noise, we think the duty quite clear that a railway company should have some one on the lookout for the purpose of warning persons on the track. A decent regard for the sanctity of human life would seem to require that a reasonable watch should be kept over a track upon which a train is moving, and that a person upon the track, and near enough to be apparently in danger, should be warned of the approach of a train. If the usual warning is ineffective to arouse to a consciousness of danger, then the failure to use every possible means to stop the train would be inexcusable negligence. The more populous the neighborhood in which a train is moving, the greater the necessity for vigilance in observing the track. At crossings and points where, by license, express or implied, the track is used as a walk-way, the more imperative the duty. But the duty is not altogether relaxed by the fact that this injury probably occurred at a point where the public had no rights. We think, upon the facts stated in this case, that it was negligence, when this train parted, not to have had some one in position to observe the track and warn persons on it of its approach. The duty of keeping a lookout we do not under-

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stand to rest alone upon our statute. This provision is, under our decisions, but a re-enactment of the rule at common law. *Railroad v. Fain*, 12 Lea, 41; *Railroad v. Pratt*, 85 Tenn., 13.

In the latter case Judge Snodgrass, in delivering the opinion of the Court, said in considering the requirements of the Code concerning the avoidance of accidents: "This section imposes no duty on the railroad companies that would not have existed at common law. The duty to keep some one on the lookout, sound the alarm whistle when any person, animal, or other obstruction appears on their road, then put down brakes and use every possible means employed for such purpose to stop the train and prevent an accident—is but, in other words, the duty to watch the road, warn any one who appears on it to get off by such noise or alarm as will most effectually do this," etc.

We have next to consider whether the deceased was guilty of such contributory negligence as should bar a recovery. That it is negligence to go upon a railroad track without taking the precaution to look and listen is well established. *Railroad Company v. Houston*, 95 U. S., 697.

He is, as a prudent man, bound to look and listen, and take such measures as common prudence suggests, in view of the danger and consequences of a neglect to do so. "This is a rule of law," says Mr. Wood, "and it is only in exceptional cases that the question as to whether his neglect to take such precaution is excusable, is

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for the jury." 2 Wood's Railway Law, 1304, 1305. The authorities to this effect are numerous, and are collected in the work cited.

It is not charged in this declaration that the intestate did look or listen before going on the track and resuming his journey, and this is one ground of demurrer. Ordinarily this would be fatal in a case not coming within the letter of our statute, which allows damages upon failure of the railway company to observe the precautions therein prescribed, regardless of the negligence of the party injured, such negligence going only in mitigation of damages. *Railroad v. Foster*, 4 Pickle, 672, where all our cases are reviewed.

The case stated in the declaration makes an exceptional case, and one which should go to a jury. The deceased stepped off to permit the approaching train to pass him. When it had passed, it was not unreasonable to suppose it had all passed. The duty to look and listen when going upon a railway track is a continuing duty so long as one continues upon it, using it as a walk-way. The duty of a person so situated to continue to look out for himself, in view of the consequences likely to result from inattention, are not less imperative than the duty of the employes operating a train to look out for him. The statute not being applicable, the negligence of each may appear equal, and, in that case, there can be no recovery. The peculiar circumstances under which this intestate went upon the track, and the fact stated to account

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for his failure to observe this train—that he was crossing a bridge, under which there was a waterfall, the noise of which probably prevented his hearing—alone prevents the negligence of the deceased from barring any recovery whatever.

The fact that the deceased went on the track without looking or listening, and that he continued upon it unconscious of danger until overtaken and run down, is negligence which cannot be overlooked, and, for this negligence, he cannot be entirely exonerated; and this must be allowed in mitigation of damages, even if the jury shall think that his negligence, under the peculiar facts of this case, was not the more immediate cause of the accident.

The demurrer must be sustained as to the second count and overruled as to the first. The case will be remanded for further pleading.

Petroleum Company v. Coal, Coke, and Manufacturing Company.

PETROLEUM COMPANY v. COAL, COKE, AND MANUFACTURING COMPANY.

(Knoxville. November 7, 1890.)

1. EJECTMENT. *Defenses by answer to ejectment bill.*

The Court, without deciding the question, intimates that legal defenses may be made by answer to a pure ejectment bill.

2. SAME. *Does not lie to recover mining interest in land, when.*

Where mines have not been opened, and the lessee has never been in possession, there can be no recovery by ejectment of the interest that he acquired in lands under a lease which provides as follows: "Witnesseth, that the said — has this day leased unto the said C. and others, or their assigns, for the term of 99 years, all of his mineral and petroleum interests, for the purpose of exploring for coal, petroleum, lead, iron, copper, and other ores, metals, and minerals, and use of timber, etc., for mining, working, smelting, and rending the same, and, for such purpose, erect all necessary buildings and other apparatus and fixtures for carrying on their operations in and upon the following described parcel of land. * * * The said C. and others, for and in consideration of the above lease, obligate and bind themselves to pay to the said — the one-tenth part of the net profits of whatever may be discovered and worked in and upon said lands deemed advisable to be tested and worked by the said C. and others or assigns. They, the said C. and others, further agree to commence testing said property within three years' time."

Case cited and approved: 72 Mo., 535.

3. MINING LEASE. *Construction of lease. Consideration.*

This lease becomes *nudum pactum* if construed to impose no legal obligation upon the lessee to explore and discover mines or to work them when discovered. That construction would convert it into a mere voluntary option that the lessors could withdraw at any time before acceptance.

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4. SAME. *Same. True meaning.*

But this lease, by proper construction, obligated the lessee to "test" the leased lands within three years, and, if minerals were discovered, to work them effectively within a reasonable time thereafter; and the "testing" within that period, and the working of the minerals within reasonable time after their discovery, were not mere *covenants*, but *conditions* upon which the life of the lease depended. For want of compliance with these conditions, this lease was forfeited.

Cases cited and approved: *Carnes v. Apperson*, 2 Sneed, 561; 89 N. C., 31.

5. SAME. *Same. Character of test required.*

And the "test" required by this lease is such as would discover not only the presence of minerals if they exist, but their commercial value, considering their abundance and accessibility. It should afford such information as a prudent and experienced investor would desire before expending money in digging shafts or erecting machinery proper for the profitable working of such mines. The test in this case was not of this character.

FROM CAMPBELL.

Appeal from Chancery Court of Campbell County.
H. R. GIBSON, Ch.

SCOTT & WELCKER, INGERSOLL & PEYTON, J. T. &
J. K. SHIELDS for Complainant.

HENDERSON & JOUROLMON for Respondent.

LURTON, J. Early in 1865 Thomas H. Calloway and John R. Branner and their associates obtained mineral leases upon a large number of tracts of

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land, aggregating 100,000 acres. These lands were owned by many different owners. The leases were to run for ninety-nine years, and in all essential respects were identical in terms. The complainant is a corporation, and, by assignment, is now the owner of these leases. The defendant is likewise a corporation, and, by purchase, has become the owner in fee of several of the tracts of land on which mineral leases are held by the complainant. More than seven years before the bringing of this bill, the defendant, upon one of its separate but adjacent tracts, opened up the very valuable coal mines widely known as the "Jellico Coal Mines." The coal-pits and workings of defendant are exclusively upon one of its tracts; and this tract complainants do not sue for, doubtless deeming the defense of the statute of limitations a bar to any suit for a mine so adversely holden.

This suit is for the purpose of recovering the mines and mineral interests in and under the surface of several tracts adjacent to and surrounding the parcel upon which the shafts and pits and tunnels of defendant are situated.

Complainant insists that the suit is one of ejectment, and as such is a legal action, and subject only to such legal defenses as are admissible at law under the plea of not guilty. The jurisdiction of the Chancery Court rests upon the Act of 1877, whereby jurisdiction was conferred upon that Court in certain causes of action theretofore cognizable alone in a Court of Law. It is therefore

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argued that in suits to which jurisdiction was thus extended, legal defenses are alone applicable, unless set up by an independent pleading, such as an original bill or cross-bill. We are not prepared to yield to this assumption, though not now decided. It is more than doubtful whether this suit could be maintained as a straight action of ejectment at law; and this for two reasons:

First, no coal mines or mines of any other sort have been opened upon the lands covered by the leases involved. There has been no separation of the mineral interest by deed from the fee. The contracts under which complainant sues are leases and not deeds. An action of ejectment to recover a mine will undoubtedly lie where the mine has been opened, because, in that case, the defendant, by the writ of ejectment, can be removed, and the plaintiff put in possession of the mine by putting him in possession of the shaft, pit, or opening. Says Mr. Adams, in his work upon Ejectment:

“Though a man may have a right to the mine without any title to the soil, yet, the mine being fixed in a certain place, the Sheriff has a thing certain before him of which he can deliver possession. When a grant of mines is so worded as not to operate as an actual demise, but only a license to dig, search for, and take metals and minerals within a certain district during the term granted, it seems that a party claiming under such a grant, and who shall open and work and be in

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actual possession of any mines, may, if ousted, maintain ejectment in respect of them; but he cannot maintain ejectment, either in respect of mines within the district which he has not opened or which, being opened, he has abandoned." Adams on Ejectment, side page 20.

The second reason operating to defeat an action of ejectment at law upon these leases, so called, is that complainants have never been in possession. Before entry such an agreement as here sued upon does not operate to convey an estate, but merely confers a right thereto. The essential parts of these leases are as follows: "Witnesseth, that the said ——— has this day leased unto the said Calloway and others, or their assigns, for the term of 99 years, all of his mineral and petroleum interests, for the purpose of exploring for coal, petroleum, lead, iron, copper, and other ores, metals, and minerals, and use of timber, etc., for mining, working, smelting, and rending the same, and, for such purpose, erect all necessary buildings and other apparatus and fixtures for carrying on their operations in and upon the following described parcel of land," etc. "The said Calloway, Branner & Co., for and in consideration of the above lease, obligate and bind themselves to pay to the said ——— the one-tenth part of the net profits of whatever may be discovered and worked in and upon said lands deemed advisable to be tested and worked by the said Calloway, Branner & Co., or assigns. They, the said Calloway, Branner & Co.,

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further agree to commence testing said property within three years' time."

Such an agreement can only be perfected by entry, and until possession has been taken the right is an executory one (called by the old law writers an *interesse termini*). Such an interest is not one which qualifies the owner to maintain ejectment. Washburn on Real Estate, side pages 295, 296; Taylor's Landlord and Tenant, Sec. 15.

Such a lessee, before entry, could not maintain trespass or conversion. *Idem*; *Austin v. Huntsville Coal Company*, 72 Mo., 535.

But complainant has not limited its prayer for relief to a common law writ of ejectment, for it has most providently added the most equitable of all prayers—one for general relief. Upon looking to the intent of these agreements as ascertained by looking to all parts of the instrument, and to the facts contained in the transcript, we are of opinion that neither in law or equity is complainant entitled to any relief. The well-defined distinction between a *condition* in such instruments and a *covenant* has been much insisted upon by the learned solicitors engaged in the cause. The contention of complainant is that the provision concerning "testing," heretofore set out, has been, in fact, substantially complied with; and that, if not, then the provision is a mere covenant, not going to the root of the contract, and not a condition upon which the lease was dependent. So it insists that while the law would imply an agree-

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ment that minerals discovered by the "test" provided for should be worked and mined within a reasonable time, yet such implied provision is a mere covenant, for the breach of which an action for damages is the only remedy. It is by no means clear that the lessees have in express terms bound themselves to either "test" or work mines so discovered. On the contrary, it would seem that it was the purpose of the lessees to engage only to "test" or work such tracts or parts of tracts as they should themselves deem advisable.

The provision on this subject is, that in consideration for the lease the lessees bind themselves to pay the lessors "one-tenth part of the profits of whatever may be discovered and worked in and upon said lands, *deemed* advisable to be tested and worked" by the lessees. Then follows the agreement that the lessees shall commence testing within three years. A fair construction of this lease would leave it optional as to whether the lessees should make any effort whatever to discover the mineral value of any particular lease, and, if "tested" and minerals developed, it seems to depend upon their judgment as to whether such mines shall be worked.

If they deem it advisable to "test" a particular tract, they bind themselves to do so within three years. No other consideration for these leases is pretended than a share in the net profits resulting from such mines as they shall deem it "advisable" to test and work. No penalty is agreed upon if

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they shall fail to "test," and no rent or other compensation is provided if they shall fail to work developed mines of minerals. If this construction be the right one, then these contracts, where actual mining has not been begun, are void for want of any consideration to support them. Some consideration must be either expressed or implied, or a lease, as any other contract, is void. If the compensation to be paid the lessor depends upon the profit to result from the development and working of a mine, and the lessee is not bound, either expressly or impliedly, to explore and discover, or, when discovered, to work such mine, then no consideration for the lease exists. It is a mere option based upon no consideration, and may be withdrawn at any time before money is expended in doing what is optional upon the part of the lessee. Taylor's Landlord and Tenant, Sec. 152.

But if the contract be construed as binding the lessee to "test" the leased lands within three years, and as requiring the working of such "tested" tracts within a reasonable time, then it must be very evident that under leases of this character both of these provisions are *conditions* upon which the lease depends. If the contracts had fixed a money rent in case of failure to "test" or "work," and the payment of such rent or penalty is not made a cause of forfeiture, the rule would be different. But here the lessee is to "test" and "work" not only for his own benefit,

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but for the benefit and profit of the owner. No other compensation for the lease is contemplated than that which is to result from the discovery and working of mines covered by the lease. The testing provided for in such case was of the very essence of the contract, not only with respect to the time within which it was to be done, but as to the thoroughness and certainty with which the mineral value of the lands should be ascertained. If the "test" should develop valuable deposits of ore or petroleum, the owner of the fee would, in case of default of lessee in operating such mines, be enabled to utilize such discovery by the enhanced value of his lands, or by operating the mines himself or through others. It cannot be conceived that these lessors contemplated for one moment that they had for ninety-nine years deprived themselves of the mineral value of their lands, without securing the operation of the mines by their lessees. The "testing" provided for was manifestly a condition upon which the lease depended. If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines, then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee. Technical words are unnecessary to raise a condition. If a fair and reasonable construction of the instrument shows that a lease shall depend upon the doing or not doing something essential to the purposes of the contract, the

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law implies the condition; and whether such condition be precedent or subsequent is to be resolved by the intention of the parties, to be gathered from the entire instrument and the circumstances surrounding the transaction. *Carnes v. Apperson & Co.*, 2 Sneed, 561.

Where there is no other consideration for a lease than the discovery and working of minerals supposed to exist, the exploration for the purpose of ascertaining the presence of minerals should be substantially and thoroughly made. The "testing" should be so thoroughly done as to determine not only the presence of such minerals, but their commercial value, considering their abundance and accessibility. The information resulting should be such as a prudent and experienced investor would desire to know before expending his capital in the digging of shafts or the erection of machinery proper for the profitable working of such a mine. No such testing was made, or pretended to be made, under these leases. A non-expert is shown to have been sent to look over the immense body of leased lands, and, from surface exposure, ascertain what he could. Whether he ever went upon the lands now involved is more than doubtful, and certainly is not a proven fact. What he may have done upon other lands is wholly immaterial unless he thoroughly "tested" the lands now concerned. From some of the leased lands this inexperienced man obtained some specimens of coal, and made some inexact measurements of exposed

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. veins. These specimens, none of which are shown to have been taken from defendant's lands, were not even examined or preserved by his principals. The "test" was not in good faith, and was well-near worthless. The purpose, as he states it, was "to hold the leases" by what may well be called a bird's-eye view of a hundred thousand acres of land. It was not entered upon with any serious view or purpose of preparing for the working of mines. It was deemed that a technical survey was necessary to hold these leases indefinitely over the lands of the owners. It was of no practical value, and not a compliance in good faith with the condition upon which these leases depended. After this survey nothing more was done toward the development of these lands. Notwithstanding the absence of railway transportation, the law implied a condition that these minerals, if any there were, should, within a reasonable time, be operated or the leases surrendered.

In the case of *Conrad v. Morehead* the facts were that a lease for mining purposes was executed for ninety-nine years. The consideration to the lessor was a share in the profits of mining. The right to surrender the lease at any time was reserved by the lessee. There was no covenant or condition requiring the working of the mines. It was held by the Supreme Court of North Carolina that there was an implied agreement that the mines should be worked in a reasonable time and manner, and that a failure, for more than twenty

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years, to work the mine operated in law as a forfeiture of the lease, although at the beginning of the term the lessee had operated the mine for many years. 89 N. C. Reports, 31.

. Upon the whole case, we are content to affirm the decree of the learned Chancellor dismissing the bill.

LONGMIRE v. FAIN.

(Knoxville. November 7, 1890.)

1. BONDS, OFFICIAL. *Liability of sureties upon additional bonds. Clerk and Master.*

Sureties upon additional bonds given by a Clerk and Master are jointly and severally liable, in the same or separate suits, with the sureties upon his original bonds to parties aggrieved by his official default, occurring either before or after the execution and approval of the additional bonds, where the latter bonds cover the entire official term, and were given, as provided by statute, pursuant to an order of Court made upon suggestion of insufficiency of the original bonds.

Code construed: §§ 966, 967, 969, 970, 971 (M. & V.); §§ 773, 779, 781, 782, 783 (T. & S.).

Cases cited and distinguished: *State v. Polk*, 14 Lea, 1; *Bramley v. Wilds*, 9 Lea, 674.

2. SAME. *Liability of sureties upon special receiver's bond made by Clerk and Master.*

Sureties upon a special receiver's bond, given by the Clerk and Master upon order of the Chancellor to secure funds in a particular cause, are liable primarily, as between themselves and sureties upon the Clerk and Master's general bonds, for his default resulting in loss of the funds held by him in the particular case.

Code construed: § 372 (M. & V.); § 330 (T. & S.).

3. CLERK AND MASTER. *Liability for default of visited primarily upon third persons other than sureties, when.*

The drawer of a bank check in favor of the incumbent of the Clerk and Master's office becomes liable for the amount of that check to the creditors of that office, although the check was given without consideration and afterwards returned to the drawer, where it was furnished to be used, and was in fact used, by the Clerk and Master in lieu of cash in making his financial reports, whereby he was enabled to cover up his default and continue in office.

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4. SAME. *Same.*

And the liability of the drawer of the check is primary, in such case, as between himself and sureties on the Clerk and Master's several bonds.

5. SAME. *Exception to manner of preparing report.*

Where Master's report is otherwise regular, and no improper conduct is averred, an exception thereto, supported by affidavit, that one of the parties to the cause served as amanuensis in its preparation is not well taken.

6. SAME. *Same. Waiver.*

And such exception is waived by the failure, without sufficient excuse, to bring it to the attention of the Court until after final decree upon all other questions and exceptions.

FROM SULLIVAN.

Appeal from Chancery Court of Sullivan County.
JOHN P. SMITH, Ch.

HAYNES & HAYNES and C. R. VANCE for Com-
plainants.

C. E. LUCKEY and THOMAS CURTIN for Check-men.

TAYLOR & ST. JOHN and INGERSOLL & PEYTON
for Sureties.

CALDWELL, J. On December 16, 1882, Will H.
Fain was appointed and qualified as Clerk and
Master of the Chancery Court at Blountville for

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the constitutional term of six years. He executed the official and special commissioner's bonds required by Code (M. & V.), §§ 368 and 370, and took charge of the affairs of the office on that day.

In 1885 the grand jury of the county, after making the examination provided for by Code, § 383, reported that those bonds were insufficient. Whereupon, requisition was made by the Chancellor, under Code, §§ 966, 967, and two sets of additional bonds, of like penalties and conditions as the original bonds, were executed—one set on October 3, 1885, and the other on January 10, 1886.

On April 10, 1884, Fain was appointed special receiver in what is called "the Hopkins case," and executed a special receiver's bond in that case in the penalty of \$3,000, and conditioned as required by law.

When making his financial reports, under Code, § 386, Fain, on two or three occasions in 1885 and 1886, filed and exhibited certain bank checks in lieu of cash that should have been on hand. These checks were drawn in his favor, as follows: One by George R. Barnes for \$500; one by John M. Fain for \$1,000, and another by A. H. Bullock for \$1,150. After these checks had been so used, and served the purpose of passing Fain's account from term to term, he surrendered them, without consideration, to their respective drawers.

Finally, in October, 1886, Fain vacated his office by resignation, and made default to the extent of \$6,010.65. The defalcation embraced funds in vari-

ous causes, "the Hopkins case" among them. Some of the funds were appropriated before and some after the execution of each set of additional bonds, and before and after the execution of the special receiver's bond in "the Hopkins case."

Anticipating litigation on account of Fain's maladministration of his office, several of his sureties made conveyances of their property.

The complainants in this cause are the persons entitled to the various funds converted by Fain. They filed this bill in September, 1887, against the principal and sureties on all the said original, additional, and special receiver's bonds, and against Barnes and others (called "check-men"), to recover the misappropriated moneys.

Defense was made, proof taken, account stated, and decree pronounced granting the relief sought in the bill. Several of the defendants have appealed, and assigned errors.

First.—Certain sureties on the additional bonds of October 3, 1885, and of January 10, 1886, submit and earnestly urge the proposition that they can, in no event, be rightfully held liable for any of Fain's defalcations occurring before they became his sureties.

The language of the decree on this subject is as follows: "That the sureties, as between the creditors and themselves, are jointly and severally liable for the full amount of the default, the additional bonds being merely cumulative, and covering the entire period of the Clerk and Master's incumbency."

The decree is right. As to the creditors of the office, the original and additional bonds are to be treated as a unit. They constitute a joint and several guaranty on the part of each and all the obligors for the benefit of all beneficiaries of funds coming to the hands of the Master during his entire term. This is the requirement of the statute and the obligation of the bonds.

The bonds of October 3, 1885, and of January 10, 1886, were executed under that article of the Code entitled: "Requiring new bonds or additional sureties from public officers." This title seems to indicate that other bonds may be given, or that other sureties may be added to the bonds already given, in any of the cases contemplated.

As to the *form* of the new bond, it is provided: "Such additional bond shall be in the same penalty, conditioned, approved, and filed in the same office, as the first official bond, and under like penalties in case of failure." Code, § 969. The penalty and condition of the additional bond are to be the same as those of the first bond, and the same liabilities are to follow a breach—the sureties on each are to be "under like penalties in case of failure." This means that the bonds are to be alike in form and also in legal effect.

Confessedly the first bond, in this instance, by its terms and by the statute, covered the full time of Fain's incumbency. The additional bonds should have the same scope. We think they have, both in fact and in law. In penalty and condition they

are identical. In dates they are different, of course. But the additional bonds recite that "the above bound Will H. Fain has heretofore been appointed Clerk and Master, * * * for the term of six years from the sixteenth day of December, 1882." This recital, without some limitation of the period to be covered by the additional bonds, indicates a purpose on the part of the obligors to comply with the statute, and bind themselves for the official delinquencies of Fain, "for the term of six years from the sixteenth day of December, 1882."

With respect to the obligation of the new bond, the statute provides: "Every such additional bond is of like force and obligation on the principal and sureties thereon from the time of approval, and subject to the same remedies, as the first official bond." Code, § 970. The exact office of the phrase, "from the time of approval," is not clear. Two contrary interpretations are suggested by adverse counsel—one that it was intended to limit the liability of such sureties to defalcations occurring *after* the approval of the additional bond; the other, that it was intended simply to define the date at which the additional bond should become *operative*, and nothing more. Both views have the merit of plausibility; the latter is more consonant with the general purpose of the statute at large concerning additional bonds. This section may properly be transposed and read as follows: From the time of approval, every such additional bond

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shall be of like force and obligation, and subject to the same remedies as the first official bond.

If "every such additional bond is of like force and obligation, * * * and subject to the same remedies as the first official bond," it must, of necessity, embrace the same period of time, cover the same defaults, and be subject to the same recoveries.

The correctness of the construction herein placed upon §§ 969 and 970 is rendered the more manifest by the next succeeding section, which defines the effect of the new bond on the old one in these words: "In no case provided for in any of the preceding sections of this article are any of the official bonds previously executed discharged, but each remains of the same force and obligation as if the additional bonds had not been given; and any person aggrieved can have his remedy upon either or all of such bonds, in the same or in separate proceedings." Code, § 971.

Here is a distinct and unqualified provision that *any person aggrieved* can have his remedy *upon either or all* of the original and additional bonds. No limitation as to time is imposed. Whether the default occurred *before* or *after* the execution of the additional bonds is entirely immaterial. In either case the person aggrieved has his right of action upon either or all of the bonds, at his election. If the officer has misappropriated money, the person entitled to it need not stop to inquire the date of the conversion, but may, in any case,

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maintain his action on the original bond, on the additional bond, or on both of them; and he may sue on them "in the same or in separate proceedings."

Such is the meaning of the three sections in detail. Taken together they give emphasis to the conclusion that the additional sureties become bound for the official term as an entirety. It may be added that the object of the additional bond is to give further indemnity to those affected by the past conduct of the officer, as well as to afford greater protection to those who may be interested in the future administration of his office; and that the liability of the sureties on the additional bond is the same as if they had simply added their names to the original bond.

We do not hold, nor did the Chancellor, that the sureties on the several bonds were equally liable *between themselves*. Provision is made for the sureties as to each other in another section, as follows: "The sureties in either bond who have been compelled to make any payments thereon for the principal obligor, have the same remedies against the sureties in all the bonds executed at the time of the default as co-sureties on the same bond have against each other, the damages being properly proportioned according to the penalty of the several bonds." Code, § 972. Application of the remedies of this section is not sought in the present proceeding.

The case of the *State v. M. T. Polk et al.*, 14

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Lea, 1, is not in conflict with our holding in this case. There the Treasurer of the State executed his official bond long after the commencement of his term, without any words of relation, and binding "each surety to the extent of ten thousand dollars, and no further." Suit was brought on that bond, and it was decided that the sureties thereon were liable for such funds as their principal had in his hands when the bond was executed, and such as were afterward received by him during his continuance in office, the liability not to exceed \$10,000 as to each surety. The sureties were held not to be liable for funds received by the Treasurer *during his term*, but *before* the execution of the bond, *because* there was "nothing in the language of the bond of a retrospective character, and calling the attention of the sureties to the fact that they were binding themselves for the past as well as the future acts of their principal." 14 Lea, 7, 8.

That case was in no sense like this one. That suit was on an *original* and not an *additional bond*; hence, the law relating to additional bonds was not applicable, and was not applied. There was no other bond, in that case, *covering the entire official term* to which the statute or the Court could refer the bond in suit for its scope as to time and measure of liability. That bond mentioned but one date, and that was the date of its execution. It did not state when the official term began nor when it shall end. There was

nothing in its language "of a retrospective character."

In this case there are original bonds, which, in terms, cover the full period of six years, beginning December 16, 1882; and there are also additional bonds in the same penalty and condition, naming the same period, and, by the statute, declared to be of like force and obligation, and subject to the same penalties and remedies as the original bonds. Besides the statutory relation of these additional bonds, they contain words of a retrospective character, viz.: "Whereas, the above bound Will H. Fain, has heretofore been appointed Clerk and Master * * * for the term of six years from the sixteenth day of December, 1882," etc.

The case of *Bramley v. Wilds*, 9 Lea, 674, is no more an adverse authority. It is true that the surety on the new bond was there held liable only for defaults occurring *after* its execution; but that bond was not executed for the same purpose and under the same statute as were the additional bonds in the present case. In that case certain sureties on the first official bond had been discharged, and the bond sued on was given in lieu under the article of the Code embracing Sections 973 to 984 inclusive. There had been no report by the grand jury that the original bond was insufficient, no requisition by the Chancellor that additional bond be given, as in the present case. The original bond was presumably sufficient, and

the creditors of the office up to that time needed no further indemnity than that already provided. Two of the original sureties were permitted to withdraw from the position of liability for the *future* official conduct of their principal, and *as to that* the new surety took their place, nothing more.

Second.—The Chancellor decreed “that the receiver’s bond in the case of — Hopkins was cumulative, and that the sureties on Fain’s general receiver’s bond are equally liable with the sureties on said special receiver’s bond to the creditors for the funds in said cause.”

It has already been stated that Fain executed a special commissioner’s bond, under Code, § 370, at the beginning of his term, and that he afterward executed additional bonds for the same purpose. All these bonds the decree properly refers to (there being no difference between *commissioner* and *receiver* as used in Code, § 370), as “Fain’s general receiver’s bond” as contradistinguished from the “special receiver’s bond” in the Hopkins case.

Certain sureties on these additional bonds, and one of the sureties on this original bond, assign error on that portion of the decree just quoted; the former contending that they are not liable for the funds in the Hopkins case: (1) Because the default occurred *before* the execution of the additional bonds; and (2) because those funds were covered by the special receiver’s bond, and none other; and the latter joining in the contention

that those funds were secured alone by the special receiver's bond.

That the special receiver's bond in "the Hopkins case" was executed, and the funds misappropriated, *before* the execution of the additional bonds, can make no difference as to the liability of the latter bonds to the beneficiaries of those funds. So far as concerns the beneficiaries, the sureties on the additional bonds stand in the same attitude before the law as do the sureties on the first bond. The reasons for this conclusion have been given in a former part of this opinion, and need not be repeated here.

What that attitude is remains to be considered. The Chancellor held it to be the same as that of the sureties on the special receiver's bond in "the Hopkins case." This is an erroneous view. The first bond was intended "to cover property or funds" that might come to Fain's hands as special commissioner or receiver *in any case* (Code, § 370), and the additional bonds were given for the same purpose. The special receiver's bond executed in "the Hopkins case" was more limited in its scope, and different in penalty and condition. It was intended "to cover property or funds" in *a particular case*, did not relate to the first bond, and cannot properly be construed as an "additional bond" in the statutory sense. Code, § 966 *et seq.* This special bond was executed under a different provision, in these words: "The Court may also require special bonds to meet particular exigencies,

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and in a suitable penalty, whenever, in its judgment, the interest of suitors renders it necessary, subject to the provision of the last preceding section." Code, § 372. Property had been attached and was to be sold in "the Hopkins case." To make safe that property and its proceeds, a special bond, in the penalty of \$3,000, was required by the Court. "To meet the particular exigencies" of that case the special bond was given.

Beyond that case the sureties on that bond are liable for no default of their principal; in that case they are liable *primarily* for every default to the extent of \$3,000. The other bonds having been given to cover property and funds *in every case*, the sureties thereon would have been liable for the default in "the Hopkins case" if the special bond had not been executed. The special bond did not discharge the other bonds in the particular case, but operated simply as a transfer of *primary* liability to the special bondsmen. After the exhaustion of that bond the other bonds are liable.

Third.—Several conveyances by certain of Fain's sureties were impeached in the bill for fraud, and were set aside by the Chancellor. His action in this behalf is, by some assigned as error. We have examined the proof on this branch of the case, and are content to simply state the fact of our concurrence in the decree. A statement and discussion of the facts would be unprofitable.

Fourth.—Decree was pronounced against each of the "check-men" for the amount of his check with

interest. They have assigned several errors, none of which are well taken. Without setting them out formally and in detail, such of them as are material will be considered. These checks were furnished to Fain without consideration, and, after they had served their purpose to his satisfaction, were returned on the same terms. He filed and exhibited them two or three times, as parts of his financial reports of his office, in lieu of money; and they were by the Court, and by committees appointed under Code, § 386, treated as so much cash on hand. So regarding them, the reports were found to be correct, and Fain was permitted to continue in office from term to term. He says that he was in great financial embarrassment, and obtained these checks and used them that he might "bridge over" his financial reports at each term of the Court. Bullock and John M. Fain signed their checks in blank, and permitted him to fill them up for any amount he might need. Barnes filled his before signing. From a very careful consideration of the evidence, which is conflicting in some respects, we have reached the conclusion that these "check-men" knew Fain's object in requesting the checks, and the use to which he in fact put them.

Under such a state of facts, we hold without hesitation that each of the "check-men" became indebted to the office for the amount represented by his check. That the law (Code, § 386) did not authorize Fain to exhibit *checks*, but required him

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to report the amount of *money* belonging to his office, is an immaterial fact so far as the liability or non-liability of the "check-men" is concerned. They will not be allowed to hide themselves behind a violation of law in which they participated. It does not lie in their mouths to say that Fain imposed upon the Court and its committees time and again to the injury of suitors, and that they who enabled him to do these things must be excused because the strict letter of the law was not pursued. If he, in violation of law, brought these checks into Court instead of money, those entitled to the money represented became entitled to the checks representing it; and the persons furnishing these checks became bound to the office for their payment. That the checks were in fact never presented for payment, and that the drawers had no funds in the banks on which they were drawn, are likewise unimportant circumstances so far as the "check-men" are concerned. It was a part of the scheme of imposition and deception that the checks should never be presented for payment, but should be returned to the drawers when they had fully served their purpose. This was known to Fain and the "check-men" alone. As to all the world besides the transaction seemed to be *bona fide*.

Of no more advantage to the "check-men" is the other fact that the checks were drawn in favor of Will H. Fain *individually*, and not in his *official capacity*. They were drawn with the understanding that they were to be used as representing

money in connection with his financial reports of the business of his office, and they were so used by him and accepted by the Court and its financial committees. Technically speaking, the checks did not, in the first instance, belong to the office or represent its funds; but having been drawn, used, and accepted in the manner stated, they in equity became the property of the office, and the drawers became bound to make them good to the office.

We concede that the use of these checks by Fain indicates that he had already misappropriated the funds represented by them; but that fact gives the "check-men" no protection, for they by their checks voluntarily bound themselves to make good the default, and they cannot now throw off the responsibility then assumed.

By receiving back their checks without consideration, and after final default for a much greater sum, the "check-men" made themselves debtors to the office to the same extent as if they had borrowed so much money under the orders of the Court. Therefore, they are each *primarily* liable for the amount of his check with interest.

Fifth.—Some of the sureties on Fain's bonds assign error on the decree as to the "check-men," and insist that they should be held liable for *more* than the amount of their respective checks with interest, on the ground that *more* damage was done by the use of the checks.

There are several conclusive answers to this

assignment. (1) It does not appear that greater damage was done by the use of the checks, though used more than one time. (2) Complainants, in their bill, seek to charge the "check-men" only with the amount of their checks and interest. Broader relief than that granted would have been unauthorized under the bill. (3) The sureties now complaining laid no ground for a larger recovery by cross-bill or otherwise.

Sixth.—An exception was filed to the report of the Clerk and Master made in this cause, on the alleged ground that it was prepared by N. J. Phillips, a party to the suit, as one of the sureties on the special receiver's bond in the "Hopkins case." The ground of this exception was disclosed by affidavit filed in its support. The Chancellor overruled the exception, and on his action in so doing several assignments of error are made. His action was right. The record shows the report as made and filed to have been the report of A. F. Martin, the Clerk and Master of the Court. If it be true that he employed Phillips, a party to the suit, as his amanuensis in the preparation of the report, that is a matter of no consequence as touching the validity of the report. No improper conduct on the part of Phillips is shown or claimed. Moreover, this exception, being upon the validity of the report as a whole, was waived by a failure to bring it to the attention of the Chancellor until after his "judgment had been invoked on all other questions and

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exceptions, and after the Court had passed upon same."

Seventh.—The other assignments of error are not well taken.

The decree will be modified as herein indicated, and otherwise affirmed.

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WOODS v. BONNER.

(*Knoxville*. November 7, 1890.)

1. EJECTMENT. *Outstanding title. Abandonment.*

The burden is upon the plaintiff in ejectment to prove abandonment of an outstanding title relied upon in defense. Affirmative proof of abandonment is required. The proof in this case is not sufficient.

2. SAME. *Same. Admissible under general denial.*

The defense of outstanding title is admissible under a general denial of complainant's title in an answer to an ejectment bill, and need not be specially set up in the pleadings.

Cases cited and approved: *Walker v. Fox*, 85 Tenn., 154; *Bleidorn v. Pilot Mountain C. & M. Company*, *ante*, p. 166; *Howard v. Massengale*, 13 Lea, 585.

(See Code, § 3963 (M. & V.); § 3239 (T. & S.).

3. DEED. *Registration. Certificate of acknowledgment.*

Registration of deed for land in this State is void when made upon an acknowledgment by the maker taken and certified by a Justice of the Peace in and for another State.

Code construed: §§ 2853, 2863 (M. & V.); §§ 2040, 2050 (T. & S.).

4. SAME. *Valid between the parties without registration.*

But the deed, when signed and delivered, is valid and effectual to pass title from the vendor to the vendee without registration or probate or acknowledgment for that purpose.

Code construed: § 2887 (M. & V.); § 2072 (T. & S.).

Cases cited and approved: *Shields v. Mitchell*, 10 Yer., 1; *Grady v. Sharon*, 6 Yer., 320; *Carson v. Browder*, 2 Lea, 701; *Templeton v. Twitty*, 88 Tenn., 595.

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5. SAME. *Registration for twenty years.*

Twenty years' registration of deed in a county other than that in which the land lies does not operate to cure defective certificate of probate or acknowledgment.

Code construed: §§ 2843, 2898 (M. & V.); §§ 2032, 2084 (T. & S.).

6. SAME. *Proof of as an ancient document. General rule.*

An unregistered deed over thirty years old is admissible in evidence without proof of its execution. Its due execution is presumed, and the subscribing witnesses, though living and present, need not be called to establish that fact. It is essential, however, that the deed be found in the proper custody, and be free from any suspicion as to its genuineness. It is not necessary that possession under the deed be proved.

Case cited and approved: 117 U. S., 263.

7. SAME. *Same. Copy admissible, when.*

Where the production of the original of such ancient document cannot be legally enforced, a certified or proven copy thereof may be adduced in evidence.

8. SAME. *Covenants passing after-acquired title.*

If, after making deed with covenants of general warranty for land to which the vendor has no title, he acquire title to the land previously conveyed, that after-acquired title will pass to the vendee by operation of the covenants of his deed.

Cases cited and approved: Robertson v. Gaines, 2 Hum., 383; Henderson v. Overton, 2 Yer., 394-398; Gookin v. Graham, 5 Hum., 480; Birdwell v. Cain, 1 Cold., 303; Susong v. Williams, 1 Heis., 630.

FROM SEQUATCHIE.

Appeal from Chancery Court of Sequatchie
County. W. H. DEWITT, Sp. Cl.

Woods v. Bonner.

BROWN & SPEARS and C. D. CLARK for Woods.

FRANK SPURLOCK and THOS. C. LIND for Bonner.

CALDWELL, J. This is an action of ejectment, brought in the Chancery Court of Sequatchie County, by George Bruce and the heirs of William Wyatt, deceased. They deraign title (Bruce to one-fifth and the other complainants to four-fifths undivided interest) through several *mesne* conveyances back to grant No. 3879, issued to Lewis Scarlett in 1834 for 5,000 acres. The defendants claim under certain deeds and adverse possession connecting them with junior grants Nos. 7914, 7915, and 10215, aggregating 5,000 acres in one body—the first two issued to Thomas Montgomery in 1840, and the last to Jacob Woodlee in 1849.

In the two bodies of 5,000 acres each there is an interlap of 1,759½ acres. To recover possession of this interlap, complainants filed this bill. In the progress of the cause in the Court below they admitted the superior title of the defendants to 332½ acres of the interlap, and decree was entered accordingly; but on final hearing complainants recovered the other 1,427 acres of the interlap—Bruce one-fifth and Wyatt's heirs four-fifths undivided interest.

Both complainants and defendants have appealed, the former from so much of decree as adjudged costs against them and as overruled certain exceptions to the deposition of Charles E. Maurice, and

the latter from the general decree in favor of complainants as to the 1,427 acres of land.

The last deed in the chain of title produced by Wyatt's heirs was executed by John E. Narcross to William Wyatt, October 25, 1839. It recognized no interest in George Bruce, the other complainant, but purported to convey substantially the whole of the 5,000 acres covered by the grant to Lewis Scarlett.

The defendants sought to establish an outstanding title to all this land in Charles E. Maurice, by proving that William Wyatt sold and conveyed it to him on January 11, 1856. To make this proof, the deposition of said Maurice, with a copy of the deed attached as an exhibit, was offered as evidence on the hearing. Complainants filed ten exceptions to the deposition; five of them were overruled, five sustained, and the deposition and exhibit excluded.

All questions were saved by proper bill of exceptions, and the defendants assign error on the action of the Chancellor in excluding the deposition. The exceptions sustained present three grounds of objection to the evidence: (1) That there was no proof that Maurice had not abandoned his title; (2) that defendants had not pleaded an outstanding title; (3) that the evidence was inadmissible for reasons stated. None of these exceptions were well taken.

First.—As to abandoned title, it is sufficient to say that the law presumes a vendee of land to

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claim his rights under his deed until the contrary is made to appear affirmatively. The burden of showing abandonment of title is on the party alleging it, and the fact must be shown by clear and satisfactory proof. The person in whom the record shows the title to have been regularly vested is not required to prove that he has not abandoned it. In this case there is no proof whatever of abandonment. Maurice received his deed, had it registered, and still holds and preserves it as evidence of his title. There is greater reason for supposing that complainants abandoned their claim of title before the commencement of this suit. Bruce took his deed in 1839, and is not shown to have asserted any claim under it until the filing of this bill in 1888. William Wyatt took his deed in 1839, and held it, without more, until his death many years thereafter. He, like Bruce, took no possession and paid no taxes. Some of his children say that he claimed to own land in Tennessee up to his death, but more is not shown; and since his death, until the filing of this bill, his heirs are not shown to have asserted any claim to the land—to have exercised any of the privileges or borne any of the burdens of ownership.

Second.—It is true that defendants did not set up defense of outstanding title in their answer or by plea; but it is not necessary that outstanding title should be pleaded. *Walker v. Fox*, 1 Pickle, 154; *Bleidorn v. Pilot Mountain C. & M. Company*,

ante, p. 166. It is a matter of evidence going to defeat the indispensable averment by complainants of legal title in themselves. They must recover, if at all, on the strength of their own title, and not on the weakness of that of the defendants. If defendants can show outstanding title in a third person, they thereby disprove the case of complainants, which they may legitimately do on the hearing without pleading the fact at all.

In their answer the defendants denied that complainants were the owners of the legal title, averred their own title, and pleaded the statute of limitations. The controlling question was one of title. Complainants affirmed, defendants denied. The proof offered was responsive to the issue. We recognize the fact that the defense of outstanding title is not favored, as stated in *Howard v. Massengale*, 13 Lea, 585; yet it is a good defense when made out, and it need not be specially pleaded.

Third.—Three exceptions to the admissibility of the deed from William Wyatt to Maurice were sustained as follows: That its execution was not properly acknowledged by the vendor; that it was not proven by subscribing witnesses; and that the deed had not been registered in such a manner as to cure the defective probate. The deed seems to have been acknowledged by the maker before a Justice of the Peace of Pennsylvania, without more. No other certificate than that of the Justice is attached, and the execution is not proven

by subscribing witnesses. Hence, there appears to have been no proper probate or authentication of the deed under the registration laws of this State. Code (M. & V.), §§ 2853 and 2863.

But those objections go only to the matter of proper preparation of the instrument for registration, and do not touch the question of its sufficiency to pass title from vendor to vendee as between themselves. It is well settled that a deed is effective, as between the parties and their heirs, without registration, or proof for registration, either by subscribing witnesses or by acknowledgment of the maker. Divestiture and reversion of title, as between them, may be perfected by a proper deed merely signed and delivered. Code, § 2887; 10 Yer., 1; 6 Yer., 320; 2 Lea, 702; 8 Tenn. Ch., 523; 4 Pickle, 595.

The registration of this deed for more than twenty years did not cure the defective probate, because the registration was made in Grundy County, and not in Sequatchie County, where the land lies. The statute perfects the defective probate only when the instrument is registered in the county where the land is situated. Code, §§ 2848 and 2898.

Therefore, the present deed is no better and no worse for having been registered so long a time. Yet, as has just been seen, the question of registration, or probate for registration, is entirely immaterial in this case.

The heirs of William Wyatt claim four-fifths of

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this land. His deed bound him and them without probate or registration. It would not have been so as to his creditors or as to innocent purchasers. Code, § 2890.

Thus it is made manifest that none of the five exceptions sustained by the Chancellor were well taken, and that all of them should have been overruled.

A question of more difficulty is whether he should not have sustained the other five exceptions which were overruled. From his action in this behalf, complainants appealed. The point and substance of those exceptions is that the deposition of Maurice, and exhibit thereto, should be rejected, because only a *copy*, and not the *original* deed, is produced.

Under the facts already recited, and in the absence of formal authentication of this deed, defendants contend that it may be proven as an ancient paper, and so used as evidence in this case. Complainants say that this cannot be done, because the original deed is not presented in Court. The general rule is that a private deed over thirty years old, as is the one before us, may be admitted in evidence without proof of its execution; that, being an ancient document, its due execution is presumed, and the subscribing witnesses, though in fact living and present, need not be called to establish the fact—provided the instrument be found in the proper custody, and is free from suspicion as to its genuineness. 1 Greenleaf

on Evi., Secs. 21, 144, and 570; 1 Wharton on Evi., Sec. 732; *Applegate v. Lexington, etc., Mining Co.*, 117 U. S., 263.

Learned counsel for complainants insist, and it has frequently been held, that accompanying possession under the deed must also be shown before it can be admitted in evidence as an ancient instrument without proof of its execution; but this view is contrary to the weight of authority, and cannot be sustained on principle. 1 Wharton on Evi., Secs. 199 and 733; 1 Greenleaf on Evi., Secs. 21 and 144, note 1.

In the discussion of the admissibility of ancient documents as evidence without proof of execution, the text-writers and Courts have generally, if not universally, referred to cases in which the original instrument itself, and not a copy, has been produced. Here only a copy is offered, and the question is whether or not it may be used as evidence of the facts recited.

Maurice was a non-resident, and gave his deposition in Arkansas. He testified that he bought this land from William Wyatt, paid him for it, and took his deed of conveyance on January 11, 1856; that he had the deed registered in Grundy County, February 5, 1856; received it back from the Register, and has ever since held and owned the deed, and has never parted with his title to the land. It is admitted that this deed covers the land sued for by the complainants in this cause. When his deposition was taken, Maurice had the

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original deed in his possession, but he refused to part with it or to permit its use as evidence. The defendants were powerless to compel its surrender. So they procured a certified copy from the Register's books, and presented that to Maurice, and requested that it be compared with the original. He made the comparison with the original in his hands, and pronounced them the same, except as to erroneous spelling of some names in the copy, which he corrected, and which we see were entirely immaterial. The defendants found the original in the proper custody. No suspicion attaches to it. Being unable to produce it in Court because the owner would not surrender it, they bring a copy, whose correctness is certified by the Register and sworn to by Maurice. The latter makes the copy, thus certified and proven, an exhibit to his deposition. Complainants, by their counsel, were present and cross-examined Maurice; yet they failed, by that means or in any other way, to cast any suspicion on the deed. They had an opportunity of inspecting the original, and no doubt did so, and if there had been any thing suspicious about it, we may fairly presume they would have shown it in some legitimate manner. The age of the paper is demonstrated by the fact of registration, though not in the proper county, for thirty-two years before this suit was commenced.

The defendants seem to have done all in their power to procure the original deed, and, failing

to obtain it, they bring a certified and proven copy. Manifestly, this is the *best available* evidence. As such it was competent, and should have been admitted. It is plenary in establishing outstanding title in Maurice, and defeats the action of the heirs of his vendor, William Wyatt.

Though embracing all the land claimed by those heirs, and that claimed by Bruce as well, the deed from Wyatt to Maurice does not defeat Bruce, who claims under an older and different deed. Gilbert conveyed an undivided one-fifth interest in the 5,000 acres to Bruce, April 4, 1839; and afterward, on September 11, 1839, Gilbert conveyed the whole of it to Narcross, not noticing his previous deed to Bruce. On October 25, 1839, Narcross conveyed the same land to Wyatt, who conveyed it to Maurice, January 11, 1856. None of these conveyances divested Bruce of his title to an undivided one-fifth interest in the land. Hence, the deed from Wyatt to Maurice does not establish an outstanding title as against Bruce.

From an inspection of these and other conveyances it is discovered that Gilbert, Bruce's vendor, did not himself acquire title to any part of the land until September 6, 1839, five months after his deed to Bruce; but the fact that Bruce did not acquire title when he received his deed is immaterial. Having made Bruce a deed with general covenants of warranty, Gilbert's title, when acquired, inured to Bruce's benefit, and his title was thereby perfected under his deed by relation.

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Rawle on Covenants for Title (4th Ed.), pp. 384, 390, 391, 392; *Robertson v. Gaines*, 2 Hum., 383; *Henderson v. Overton*, 2 Yer., 394-398; *Gookin v. Graham*, 5 Hum., 480; *Birdwell v. Cain*, 1 Cold., 303; *Susong v. Williams*, 1 Heis., 680.

The defendants excepted to the evidence of Bruce's title in the Court below, on the ground (as stated in the exception) that a copy of his deed was produced without accounting for the absence of the original. The overruling of that exception and the admission of the evidence tendered are here assigned as error. The assignment is not well made. It does not appear from the record that a copy was in fact used. On the contrary, the instrument copied into the transcript seems to have been the original deed itself.

Let the decree be affirmed as to Bruce, and reversed and the bill dismissed as to William Wyatt's heirs, the other complainants.

Wyatt's heirs will pay two-thirds and the defendants one-third of all costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1890.

ELECTRIC RAILWAY COMPANY *et al.* v. SHELTON.

(*Nashville.* December 6, 1890.)

NEGLIGENCE. *Concurrent of electric railway company and telephone company.*
Joint liability.

Both companies—the electric railway and the telephone company—are liable for the value of a horse killed by coming in contact with a broken wire of the telephone company—it appearing that the telephone company had negligently permitted its broken wires to fall and remain upon the trolley-wire of the electric railway company, and that the latter company had failed to place guard-wires over its

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trolley-wire as a protection against accidents, and to observe the condition of the broken telephone wires, although it was such as to arrest the attention of a prudent man engaged in the business of either company.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. A. G. MERRITT, Sp. J.

Action for damages by C. F. Shelton against the United Electric Railway Company and the Cumberland Telephone and Telegraph Company. Judgment below for plaintiff. Appeal by defendants.

STEGER, WASHINGTON & JACKSON, for Railway Company.

VERTREES & VERTREES for Telephone Company.

J. L. NOLEN for Shelton.

TURNER, Ch. J. Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley-wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the

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point of the accident the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley-wire, and while resting on it the horse came in contact with it and was instantly killed. There was no guard-wire over the trolley-wire. The case was tried by the Circuit Judge without the intervention of a jury. The condition of the telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The Circuit Judge found, under the facts, that both companies were guilty of negligence and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley-wire was in like manner protected from such contingency. While it was the duty of the one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not con-

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finned to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley-wire, and the consequences of a contact of the wires of the one with those of the other. Both knew of the unsoundness likely to produce a fall of the one upon those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable.

Affirmed.

Eury v. Insurance Company.

EURY v. INSURANCE COMPANY.

(Nashville. December 13, 1890.)

INSURANCE. *Failure to pay premium before loss excused.*

Upon the special facts of this case, which are fully set out in the opinion, it is decided that the holder of an accident policy is excused for non-payment of the premium prior to the occurrence of his loss or injury, and that he may nevertheless recover against the company upon the policy.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. W. K. McALISTER, J.

A. D. MARKS for Eury.

W. G. HUTCHESON for Insurance Company.

TURNER, Ch. J. The defendant issued to plaintiff an accident insurance policy under the following circumstances: Eury was in the employment of the Louisville and Nashville Railroad Company as an extra porter, without regular employment, but required to report at the depot before the departure

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of each train to take the place of any one who might be sick or desired to lay off.

He was approached by an agent of the defendant and solicited to take a policy. The plaintiff, who it seems is a dull negro, did not understand. The agent explained it and its benefits. The negro fully explained the character of his employment on the road. When told the cost of a policy was fifteen dollars, he said he did not have that much money; the agent replied that he would take an order on the railroad to be paid out of his wages. Thereupon the contract was made, plaintiff giving the order payable in five monthly installments.

None of the papers were read to plaintiff, nor did he read them. It is with difficulty that he reads at all, and his signature to the order is so illegibly executed that the agent wrote the name just below the signature that he might thereafter know it.

Policy issued November 30, 1887. The order on the railroad company was sent to the superintendent of the railroad company. On January 9, 1888, it was returned to the cashier of the Louisville and Nashville Railroad, at Louisville.

On January 23, 1888, while engaged in coupling cars, Eury was injured, and afterwards lost a hand, and this suit is brought to recover on the policy.

The defendant proves by its manager "that it is the custom to present all orders given before the twentieth of any month to the treasurer of the Louisville and Nashville Railroad in one list

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for that month. This list is handed in about the twenty-fourth of each month. * * *

About the twenty-fourth of each month a list is made up of the amounts due from the various employes to us, and this we hand with the orders to the officers of the railroad, who pay them out of the amount of wages due, under an arrangement with us.

"The order given us by Eury was handed in in the usual way, and was returned to us unpaid about the ninth or tenth of January, with information that Eury had left the service of the company, and that there was nothing due him.

"The Louisville and Nashville Railroad and our company are on the best of terms. They afford us every facility for the transaction of our business. If I had requested it, the officers would have permitted me to inspect the pay-rolls of the company."

The first installment of the order was due in December, it calls to be paid out of the wages for that month. After it was filed with the treasurer of the railroad company, the defendant failed to take any further notice of it, or to collect, or attempt to collect, the amount due upon it, although on the best of terms with the railroad officials, who afforded it every reasonable facility for the transaction of its business.

No sufficient reason is given why the December installment could not have been collected, nor why it was allowed to sleep from its maturity in December to the ninth or tenth of January.

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The ignorance and illiteracy of the plaintiff, fully discovered to the agent of defendant, is not to be overlooked. When that agent asked him if he had any insurance on his life, he asked him what that was. When explained he said he thought it was a good thing, but that he did not have fifteen dollars, and the agent said "that he would take an order on the railroad to be paid out of my wages. I told him that was all right." All this was deposed to in the presence of the agent, who does not contradict it.

Whatever might have been the views of men of ordinary business intelligence, it is clear to our minds the plaintiff thought there was nothing more for him to do; that the contract was complete, and that he was entitled to recover the sum stipulated to be paid if he should meet with an accident.

He had informed the agent of the uncertainty of his employment, and, as a consequence, of the uncertainty of his earning wages, and understood the agent to contract with a view to those uncertainties. Plaintiff received no intimation to the contrary of such impressions naturally made upon his ignorant and uninformed mind.

Under all the circumstances of the case, including the delay in the effort to collect and the failure to inform plaintiff that the taking of the order was not to operate as a complete discharge of his obligation to pay, the plaintiff was entitled to notice of demand and non-payment.

Judgment reversed and new trial awarded.

Dickle v. Abstract Company.

DICKLE v. ABSTRACT COMPANY.

(Nashville. December 13, 1890.)

ABSTRACT COMPANIES. *Liability for negligence.*

An abstract company that furnishes to the owner of land an abstract of title with guaranty of its correctness, for the purpose of enabling him to effect a sale, is liable to a purchaser who buys upon the faith of that abstract, for damages resulting from a failure of title by reason of prior registered conveyances of the vendor, which would have been disclosed by an abstract prepared with proper skill and care.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

STOKES & STOKES for Dickle.

A. N. MILLER for Abstract Company.

TURNER, Ch. J. Complainants purchased from Bowman, a resident of California, at the price of \$200 per acre, a tract of land, represented to contain twenty-one acres and thirty-six poles, in Davidson County.

Complainants declined to purchase until they

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were furnished with an abstract of title. Bowman thereupon applied to defendants to make the abstract, which was done, and Bowman paid for it. They delivered the abstract to Bowman, and guaranteed it to be a true and perfect abstract of the title. On being furnished with the abstract, which showed the title to be in Bowman, complainants made the purchase on the faith of it.

It subsequently developed that two conveyances, embracing about four acres of the land, had been made, but were not noticed in the abstract.

The deed from Bowman to complainants was prepared by the abstract company.

Such are the substantial allegations of the bill, which is brought to have the abstract company account.

There was demurrer, because the bill does not allege fraud, and there is no privity of contract between complainants and defendants. It was not necessary to allege fraud; a statement of facts is all that is necessary.

It is clear from the bill that complainants relied upon the abstract and the guarantee of its correctness, and would not purchase without it. The abstract company held itself out as competent to do the work, and it is well understood that purchasers rely upon the work of such corporations as security for the perfectness of title, and expect them to point out any defects. Such was the case here. Complainants declined to purchase except upon an abstract.

To furnish abstracts of titles is a business. Parties undertaking it assume the responsibility of discharging its duties in a skillful and careful manner. Patience in the investigation of records is the main capacity required. There is no professional opinion. The agent has only to furnish the facts from the Register's office, without concern for their legal effect. Upon the facts furnished, the purchaser must determine for himself on their sufficiency. The abstract company collects the evidence, and for such collection it is entitled to its fee. If it makes a mistake or oversight, as in this case, it must respond to the injured party.

The payment for the four acres already conveyed was the result of the unskillful work of the defendant. Holding itself out to the public as competent and skillful, it must be so, or supply the want by answering for the loss it brings about.

The allegations of the bill clearly make a privacy of contract between the purchasers and the defendant. Upon the work of the latter depended the acceptance or refusal of the offer to sell.

Decree sustaining demurrer is reversed, and cause remanded for further proceedings.

Standard Oil Company v. Swan.

STANDARD OIL COMPANY v. SWAN.

(Nashville. December 16, 1890.)

EVIDENCE. *Business methods of a particular individual not admissible upon question of due care.*

Swan sued the Standard Oil Company for value of property destroyed by fire, which he avers originated through the negligence of that company in the conduct of its business. Upon the question of the company's exercise of due care the plaintiff was permitted, over defendant's objection, to prove the particular methods employed by an individual in the conduct of a like business. This proof was made by a mere clerk, who was not an expert, nor examined as such.

Held: This was error. This evidence does not satisfy the rule under which the custom and usage of well-appointed and managed companies engaged in like business is admitted upon the issue involved.

Case cited and approved: *Railway Company v. Manchester Mills*, 88 Tenn., 663.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. W. K. McALISTER, J.

EAST & FOGG and VERTREES & VERTREES for Standard Oil Company.

STEGER, WASHINGTON & JACKSON and DICKINSON & FRAZER for Swan.

Standard Oil Company v. Swan.

TURNEY, Ch. J. This action was instituted in the Circuit Court to recover damages for a loss by fire communicated to Swan's property from burning buildings, oils, etc., of plaintiff in error, alleged to have become fired through the negligence of the oil company.

There was recovery and an appeal to this Court.

Defendant in error introduced McIlwain, who testified that he was employed at the Cassetty oil-works; that Mr. Cassetty was not able to be present as a witness. Over objection he stated that they keep, in small quantities, gasoline, benzine, and naphtha. The objection was to the effect that the witness "might show how such business is conducted in general, but could not show how Mr. Cassetty or any other particular man does business."

Mr. Cassetty had been in the business about five and one-half years.

The witness does not show himself to be an expert in the business, but describes the manner of Mr. Cassetty in its conduct.

In his charge to the jury, the Court said: "Proof has been admitted as to how individual dealers in this vicinity stored and handled these substances. While this proof is competent as evidentiary facts, you are not to understand the defendant's liability is to be controlled by the usage of any particular dealers; but the question is whether the defendant conducted its business as a reasonably prudent man, dealing in the character of materials, would have done."

Custom and usage of well-appointed and managed companies engaged in the business of the Standard Oil Company would have been competent evidence on the question of the care and diligence required in the proper conduct of the business (4 Pickle, 663); but did the evidence admitted satisfy the rule? We think not. The witness does not show that he was acquainted with the usage and custom of well-appointed and well-managed concerns of the kind. He only knows of the conduct of one, without explaining his relation to it. What influence, or whether any, the testimony of this witness had with the jury is not for us to say. It is sufficient to know that it might have had the effect to induce the jury to try the case by a comparison of the ways in which the businesses of the two houses were conducted, and yield its judgment to the favor of that one which escaped conflagration. To hold that the testimony as given was competent for the consideration of a jury, would be to hold that the custom and usage of one company, comparatively small, with less inducement to care, should prevail over one of a large business, with the greatest incentives to watchfulness and caution. The evidence, to be competent, must amount to something going to establish a custom in the business under investigation.

While the Court told the jury that "while this proof was competent as evidentiary facts, it was not to understand the defendant's liability was to

Standard Oil Company v. Swan.

be controlled by the usage of any particular dealers," the impression of their right and power to consider or determine the value of it for themselves was not removed, and we can have no assurance that it did not largely tend to bring about the verdict.

In overruling the objection to the testimony the Court stated the rule with substantial accuracy, but that statement, under the facts, was calculated to mislead.

The judgment is reversed.

Insurance Company *v.* House.

INSURANCE COMPANY *v.* HOUSE.

(*Nashville.* December 16, 1890.)

1. INSURANCE, FIRE. *Requirement of foreign company as to cash capital.*

The statutory requirement that a foreign fire insurance company, before engaging in business in this State, shall be "possessed of at least two hundred thousand dollars of paid-up, actual cash capital, of which at least one hundred thousand dollars shall be invested in United States bonds," etc., is not sufficiently met by showing that such company, being a mutual, had the required amount in *cash assets*, with \$100,000 invested in United States bonds. Cash assets are not the equivalent of cash capital.

Acts construed: Acts 1875, Ch. 109; Acts 1887, Ch. 187.

(See now Acts 1890-91.)

2. SAME. *Same. Insurance Commissioner's duty. Mandamus.*

And the Insurance Commissioner performs his plain duty in refusing admission and license to such non-complying company, and will not therefore be interfered with by mandamus.

Question reserved: Will the Court compel the Commissioner, by mandamus, to reverse his judgment and grant admission and license where they have been wrongfully refused to a foreign company?

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

Insurance Company v. House.

VERTREES & VERTREES for Insurance Company.

J. C. McREYNOLDS and Attorney-general PICKLE
for House.

LEA, J. This is a petition for mandamus to compel M. F. House, the Insurance Commissioner of Tennessee, to issue a license to the complainant company, authorizing it to transact fire insurance business in this State.

Complainant is a mutual fire insurance company chartered under the laws of the State of New York. Our statutes, Acts of 1875 and 1887, provide it shall not be lawful for any insurance company, not organized under or incorporated by the laws of this State, to transact any business of insurance in this State, through agents or otherwise, unless possessed of at least two hundred thousand dollars of paid-up, actual cash capital, of which at least one hundred thousand dollars shall be invested in bonds of the United States or some one or more of the States, reckoning the same at their current market value, and shall file a certified statement with the Commissioner, exhibiting the facts and items required by our statutes; and it is further provided in Sec. 5, Acts of 1875, Ch. 109, "that whenever any insurance company, as provided in Sec. 1, shall have fully complied with all the requirements of this Act, and the Commissioner is satisfied that the affairs of such company are in a sound condition, he shall issue certificates of authority to such persons as the com-

Insurance Company v. House.

pany may designate, authorizing them to transact the business of insurance in this State."

There was a demurrer filed to the petition, setting forth, among other grounds, that the action of the Insurance Commissioner in granting or refusing to grant license to do business in this State is discretionary and judicial, and, having refused license, mandamus will not lie to compel him to issue license as prayed for; that complainant is a company organized under the laws of New York, and has not a paid-up, actual cash capital as required by statute before license can be granted; that no fire insurance company doing business on the mutual plan, and without capital stock, can be licensed under the laws of this State; and that the petition fails to show that the company has complied with all the provisions of the statutes, or that the Commissioner is satisfied of the sound condition of the company.

The demurrer was sustained, and the petition dismissed, and petitioners have appealed and assigned errors, and quite a number of interesting questions have been presented and ably and earnestly argued. We enter into no discussion of the question whether an officer clothed with discretion, and who has exercised that discretion, can have his decision reviewed by a writ of mandamus, or whether the writ will lie when insufficient reasons are given for his decision, or for a misconstruction of the law applicable to the subject upon which he bases his decision.

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The Commissioner refused to grant complainants license to do business in this State for the following reasons, as set forth in a letter to its attorneys: "Because its statement filed in this office is not in conformity to the requirements of our statute, in that it does not show an actual, paid-up cash capital of two hundred thousand dollars, as is provided by statute, and for the further reason that, being a purely mutual company, it cannot comply with this provision and other provisions of our statute regulating and providing for the admission of fire insurance companies to this State."

The statutes—Acts of 1875, Ch. 109; Acts of 1887, Ch. 187—require a paid-up, actual cash capital of two hundred thousand dollars, but it is insisted that this company has more than that amount in a fund known as an advance premium fund, more than one hundred thousand of which is invested in United States bonds, and more than that amount in assets of the company, and that this is a compliance with the requirements of the law requiring a paid-up, actual cash capital. We do not think so. The advance premium fund is a fund raised by subscribers paying for insurance in advance, and the amount of assets of the company is not an equivalent.

In the Acts of 1875 and 1887 the company is required expressly to have this paid-up capital, one hundred thousand of which shall be invested in United States bonds, and this is the only positive financial requirement by the Acts. It is

provided by the Act that a sworn statement shall be filed with the Commissioner showing assets, amount of money deposited in bank, premiums, losses, etc., but this statement is to satisfy the Commissioner of the solvency of the company, but no amount of assets is designated, no amount of cash in bank, but the Acts provide affirmatively that there must be a paid-up, actual cash capital before the company can be licensed to do business in the State. This must appear, although the Commissioner might be otherwise satisfied—from the advance premium fund, and from the amount of assets—that the company was entirely solvent. This is no technical or restricted construction of the statute, but is the plain legislative intent as gathered from the language of the Act.

The decree sustaining the demurrer and dismissing the petition is affirmed with cost.

Turner Bros. v. Argo & Co.

TURNER BROS. v. ARGO & CO.

(Nashville. December 16, 1890.)

1. CHANCERY SALE. *Decree for, barring redemption, erroneous, when.*

Decree for sale of debtor's land barring his right of redemption is erroneous unless there is in the bill a prayer for sale in bar of that right.

2. HOMESTEAD. *None in wife's land.*

Husband and wife cannot assert, either jointly or singly, a right of homestead in the wife's land against a decree for their joint debt.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

WHITMAN & GAMBLE for Turner Bros.

MARKS & MARKS and J. G. BRANCH for Argo & Co.

LEA, J. Turner Bros. filed a bill against L. F. Argo and his wife, Rebecca H. Argo, partners, under the firm name of L. F. Argo & Co., to

collect an account for goods sold, and to set aside a fraudulent sale of the goods to one Whitmore.

Afterward an amended bill was filed, attaching three lots in the city of Nashville, belonging to Mrs. Argo.

The bill and amended bill were answered. The correctness of the account was admitted, but it was insisted in both answers that, while the name of the husband was used in the firm name, the wife alone owned the stock of goods, and the husband had no interest therein; and Mrs. Argo in her answer claimed that she was entitled to homestead in the three lots attached, if a sale thereof was ordered.

The Chancellor gave a decree in favor of complainants for the amount of their debt, and ordered a sale of the land upon a credit, barring the equity of redemption.

The case is here by writ of error.

The defendants have assigned two errors: First, because the Court ordered the sale barring the equity of redemption; and, secondly, because of the refusal to grant homestead.

The first assignment is well taken. There was no application in the amended bill, under which the land was sold, to bar the equity of redemption.

The second assignment is not well taken. The lands belonged to Mrs. Argo. The law provides for the exemption of a homestead to each head of a family. In law, though it may be otherwise

in fact, the husband is the head of the family. She is not therefore entitled to homestead out of her own lands; nor, as contended in argument, is the husband entitled to homestead in lands belonging to the wife.

The decree of the Chancellor will be affirmed, with the modification above indicated. The land will be sold for cash, subject to equity of redemption. The cost will be paid by defendants.

Helms, Adm'r, v. Elliott.

HELMs, Adm'r, v. ELLIOTT.

(Nashville. December 16, 1890.)

1. DESCENT AND DISTRIBUTION. *Next of kin. Adopted child.*

An adopted child, though declared next of kin to the adopting parent by special statutory provision, is not thereby placed in such situation with reference to his brothers and sisters—children of the blood of such parent—as to become, in any event, their next of kin within the meaning of the common canons of descent and distribution as prescribed by our statutes. Next of kin signifies nearest in blood. The tie of blood is wanting between the adopted child and his brothers and sisters of the blood of the adopting parent.

Code construed: §§ 3278, 4388, 4389, 4390 (M. & V.); §§ 2429, 3643, 3644, 3645 (T. & S.).

Case cited and distinguished: McKamie v. Baskerville, 86 Tenn., 459.

2. SAME. *Case in judgment.*

C. died intestate, leaving an adopted child and two children of his own blood. His estate was inherited equally by the three children. Afterward one of the children of C.'s blood died intestate, and without issue or parents. The adopted child claimed one-half of this decedent's estate, consisting of personalty.

Held: The adopted child is not next of kin, and takes no part of the estate.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

• Helms, Adm'r, v. Elliott.

JAMES S. PILCHER for Elliott and Wife.

C. D. BERRY and A. N. GRESHAM for Anderson Lewis' Heirs.

CALDWELL, J. In 1856 Louie Lewis, by proper proceeding in the County Court of Davidson County, adopted Anderson Cheatham as his child, and had his name changed to Anderson Lewis. Louie Lewis died in 1863, leaving one daughter (Sallie Carter), a grandson (Lewis Jones, the only child of a deceased daughter), and Anderson Lewis, the adopted son, as his only heirs at law.

In 1873 the grandson, Lewis Jones, died intestate, without child, brother, or sister, or descendants of either; without wife, father, or mother, and owning certain personal property. When he died his aunt, Sallie Carter, and his adopted uncle, Anderson Lewis, were living.

The question for our determination is: Are these two persons entitled to participate equally in the distribution of Lewis Jones' estate, or does his aunt take it to the exclusion of his adopted uncle?

No such thing as *adoption* was known to the common law. It is purely a creature of statute. Louie Lewis adopted Anderson Cheatham under the Act of 1851-52, Chapter 338, Section 2, which is as follows:

"That the County or Circuit Courts shall have concurrent jurisdiction and power to authorize and

empower any person or persons to adopt any child or children as their own upon application by petition or motion; and the adoption and the names of the parties, and the terms of the adoption, shall be entered upon the records of the Court, and the Court shall have discretion to refuse the prayer of the petition. Such act shall confer upon such child or children the rights of a child or children, as if they were born the child or children of such parent, and capable of inheriting or succeeding to the personal or real estate of the parent as heir or next of kin, but shall confer no rights upon the person making the adoption to inherit or succeed to the personal or real estate of the child adopted, nor give him any right or interest in the estate of such child."

The substance of this section was carried into the Code (T. & S.) at §§ 3643, 3644, and 3645. As between the adopting parent and the adopted child the statute declares, in the plainest terms, that the adopted child shall, by the act of adoption, acquire all the rights of a child born to such parent. The adopted child becomes entitled to the same protection and support as if born the child of the adopting parent, and is given the capacity of inheriting or succeeding to the estate of the adopting parent as heir or next of kin. The adopting parent assumes the same parental obligations to the adopted child as if such child were born to such parent, and the adopted child is clothed with the same rights in the estate of

Helms, Adm'r, v. Elliott.

the adopting parent as an heir or next of kin. This is the full measure of the benefits conferred upon the adopted child. No claims are given upon any one except the adopting parent; no property rights are conferred except in the estate of such parent.

It is contended that the legal *status* of the adopted child is the same as that of the child born in lawful wedlock, and that, as a consequence, the same rights of heir and next of kin exist in the one case as in the other—not only as to the parent, but as to all other persons. This position is sound in part only. So far as the parental obligations and the estate of the adopting parent are concerned, it is well taken, but beyond that it is not tenable. As to the estates of other persons than the adopting parent, the law of adoption fixes no right in the adopted child. It is only as to the adopting parent that the adopted child is made "heir or next of kin" by the statute. By the adoption Anderson Lewis, the adopted son, became vested with all the rights of heir and next of kin of Louie Lewis, the adopting father; but he was not thereby made the heir and next of kin of the children born to Louie Lewis. As to them he occupied the same relation in law *after* the adoption as *before*—that of a stranger in blood. The relation between Louie Lewis and Anderson Lewis was purely personal. It was limited and qualified. It was not a relation of blood, and, except as to the adopting parent, it created none

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of the rights which, by the general law, depend upon blood relationship.

When Louie Lewis died his estate was equally divided among his daughter, his grandson, and his adopted son. Years thereafter the grandson, Lewis Jones, died intestate, owning a personal estate, which is the subject-matter of this litigation.

After the payment of debts and charges, the personal estate of all persons dying, as he did, intestate and without widow or children, or descendants of children; without father or mother, and without brother or sister, or child of either, is, by the statute of distribution, distributable "to every of the next of kin of the intestate who are in equal degree, equally." Code, § 2429.

The statute of distribution, and not the statute of adoption, controls this case; and unless the adoption made Anderson Lewis the *next of kin* of Lewis Jones, the decedent, he can have no share in the latter's estate, for it goes to his "next of kin," and to them only, by the express terms of the statute. The strict legal meaning of the phrase, "next of kin," is next or nearest in blood. In ascertaining who the next of kin is, the law follows the line of consanguinity. Such is the general rule of the common law. It is the same in this State under our general statute of distribution. It is so in every case, unless there be an express statutory exception. In the law of adoption, such an exception is made; but, as we have already seen, it applies alone to the estate

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of the adopting parent. The law of adoption arbitrarily establishes for the adopted child the relation of heir and next of kin to the adopting parent; but it does not establish such a relation to the descendants of the adopting parent. As to them and their estates, the adopted child stands in no other relation than that existing before the act of adoption. The adopted child becomes a beneficiary in the estate of the adopting parent by virtue of a particular provision of law, which has no application to the estate of any other person. The estates of other persons are unaffected by that particular provision, and are left to be administered under the general laws of the State.

That the phrase, "next of kin," in the statute of distribution, is there used in its strict legal sense, and means *next in blood*, is manifest from the context, and from the provision that the distribution shall be made among persons "who are in equal degree equally." The words, "who are in equal degree," signify those persons who stand in the same nearness of blood relationship to the intestate.

Then it is clear that Anderson Lewis, the adopted uncle, was not next of kin to Lewis Jones, and that Sallie Carter, the sister of his mother, was his next of kin, and as such entitled to his estate as sole distributee.

Since the death of Lewis Jones, Anderson Lewis has died intestate, leaving several children, and Sallie Carter has also died intestate, leaving one

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child and no husband. That child, Georgia Elliott, takes in right of her mother.

We cannot agree that either the *reasoning* or the decision in *McKamie v. Baskerville*, 2 Pickle, 459, justifies a conclusion contrary to that arrived at in this case.

In construing the statute of legitimation, which is different in its object and in its language from the statute of adoption, the Court held, in that case, that legitimated children had all the rights of children born in lawful wedlock, and were capable of taking the estate of their father's brother as heirs and distributees. The case was well decided, on the ground that the bastard has the blood of his parents, and that the act of legitimation removes the taint of illegitimacy and gives the child the same legal *status*, in all respects, as if born in lawful wedlock. The event of legitimation makes the legitimated person, to all intents and purposes, the lawful child of the legitimating parents. Such is not the effect of adoption.

Affirmed.

 Steger, Assignee, v. Arctic Refrigerating Company.

STEGER, Assignee, v. ARCTIC REFRIGERATING COMPANY.

(Nashville. January 1, 1891.)

 1. MECHANICS' LIEN. *Statutes creating liberally construed.*

Doctrine re-affirmed and declared a "fixed policy" that statutes creating liens upon real estate in favor of those who, under contract with the owner, have furnished labor or materials for erection of buildings, machinery, etc., thereon, are construed liberally in favor of lienholders as regards the subject-matter to which the lien should attach.

Code construed: § 2739 (M. & V.); § 1981 (T. & S.).

Cases cited and approved: *Alley v. Lanier*, 1 Cold., 541; *Burr v. Graves*, 4 Lea, 557; *Barnes v. Thompson*, 2 Swan, 314; *Halley v. Alloway*, 10 Lea, 524; *Kay v. Smith*, 10 Heis., 43.

Cited and distinguished: *Luter v. Cobb*, 1 Cold., 528.

 2. SAME. *Case in judgment. Illustration of doctrine.*

The Arctic Refrigerating Company erected a factory upon a lot in Nashville for the manufacture of vapor for "cold storage." By permission of the city this company laid subterranean pipes in the streets, connecting with its factory, to convey the vapor to its customers. P. supplied labor and materials in erection of the factory, and also furnished and laid down the pipes in the streets.

Held: The plant, including lot, factory, pipes, etc., is an entirety, and P.'s lien for materials furnished or labor done upon any part of it attached to the whole.

Cases cited and approved: 101 U. S., 443; 141 Mass., 523.

Cited and distinguished: 6 Wall., 561.

 3. SAME. *Takes precedence of attorney's fees, when.*

The mechanics' lien is paramount to attorney's lien or claim for fees upon this state of facts: After the mechanics' lien had attached to realty, the owner made a general assignment of all his property for the benefit of his creditors. Under bill filed by the assignee, for the purpose of selling property and adjusting liens and claims of creditors,

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the encumbered land was sold for less than the lien-holder's claim. The assignee resisted the mechanics' lien, and the holder of this lien employed counsel and asserted it over the assignee's resistance. The assignee's attorney claimed fees out of fund realized from sale of the land.

Cases cited and approved: *Hays v. Dalton*, 5 Lea, 560; *Pierce v. Lawrence*, 16 Lea, 572; *Blackburn v. Clarke*, 85 Tenn., 507.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

STEGER, WASHINGTON & JACKSON for Steger.

J. P. HELMS for Mrs. Perry.

DICKINSON, Sp. J. The Arctic Refrigerating Company, a corporation created by the State of Tennessee, organized for manufacturing vapor to be used for "cold storage," erected in Nashville buildings, with appliances and machinery, necessary for that purpose.

As a part of its business it proposed to furnish cold vapor to consumers at a distance, supplying the same by pipes laid in the ground through the streets, connecting the storage compartments of such customers with the factory.

Appellant, Mrs. Medora Perry, a single woman,

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who owned a machine-shop in the city of Nashville, supplied machinery and labor in the building of this factory, and also furnished and laid in the streets pipe for transmitting cold vapor.

The first question presented for decision is whether or not the material and labor for the pipe laid in the streets is secured by a mechanic's lien on the ground where the factory was located.

It is insisted on the one hand that the lien only extends to work and labor done and materials furnished upon the realty owned by the company. For Mrs. Perry it is contended that the plant, considered in reference to its purposes, must be taken as an entirety, and that the pipes laid in the streets, by license of the city, for the purpose of conveying the cold vapor to consumers, are essential for carrying on the business contemplated, and that work done upon any part of the plant thus considered as an entirety is protected by a mechanic's lien commensurate with the whole. The language of the statute (§ 2739 of the Code) is: "There shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired," etc. Taken literally, it would seem that the lien is confined to the ground upon which the work has been done.

In *Alley & Bush v. Lanier*, 1 Cold., 541, the Court (Judge Caruthers delivering the opinion), said: "The manifest intention of the Legislature to secure and protect the laborer in his wages, and thereby to promote and encourage improve-

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ments, should not be defeated by a too rigid construction of the language employed," and that "a liberal construction should be placed upon it to carry out the purposes intended;" and held that the language in the Act—"lot of ground or tract of land upon which a house has been constructed, built, or repaired, * * * by special contract with the owner," etc.—covered a leasehold interest.

In *Burr v. Graves*, 4 Lea, 557, Cooper, Judge, says: "The lien is favored by the Legislature, and should not be hazarded by dangerous niceties in its enforcement."

In *Barnes v. Thompson*, 2 Swan, 314, the Court says: "The object of the Legislature was to secure to an industrious, meritorious class of the community the benefit of their labor, and the Act should be so construed as to carry out this laudable purpose. The manifest intention and policy of the Legislature should not be defeated by a too rigid construction of their language."

Pursuing this policy of liberal construction in *Holly v. Alloway*, 10 Lea, 524, the Court held that the lien extended to scenery, seats, etc., in theaters, and looked to the character and purposes of the structure, saying: "In getting up a theater the whole building, considered in reference to its uses, makes the house contracted for; all that serves to complete and furnish such a house, for the purpose designed, makes up the house, and is part of it when completed."

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In *Luter v. Cobb*, 1 Cold., 528, Judge McKinney says that this lien must be taken strictly. However, it appears that he was in that case referring to the limitation prescribed by the statute for asserting such lien, and not to the application of the lien.

This distinction is pointed out by Judge Deadrick in *Kay v. Smith*, 10 Heis., 43.

Having in view, then, the purposes of the statute and the rule of liberal construction, which has become a fixed policy in this State, is the lien in this case confined to work and material put within the boundaries of the realty belonging to the company? While in this case the pipes laid in the street constituted, in comparison to the rest, but a small part of the entire plant with its appurtenances for carrying on the business, yet it may readily be conceived that, in a business of this character, the conditions might be entirely reversed, and in extensive works erected for such a purpose, and successfully operated, under liberal patronage, appliances such as pipe, etc., outside of the realty where the product furnished is manufactured, might constitute by far the most costly part of the plant.

The business now contemplated is new in character and unfamiliar, but it is not unlike, so far as the connection between the generating point and the consumer is concerned, the arrangement of a gas company. The pipes are just as essential for carrying on the business as the machinery and buildings for manufacturing the product, and

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the severance of either from the other destroys in like degree the efficiency of the whole. The pipes and the license or easement under which they are laid would certainly pass under a sale of the property as an entirety and for operating purposes, no reservation being made.

In *Canal Company v. Gordon*, 6 Wall., 561, upon a statute similar to the one under consideration, it was held that where work was done upon an extension of a canal, the mechanic's lien would not extend to the whole canal. The Court, however, placed its decision upon the ground that the old and new sections of the canal were distinct works—one having been finished and in use before the other was contracted for.

The same question came before the Supreme Court in *Brooks v. Railway Company*, 101 U. S., 443, upon a statute similar to ours in respect to the question now under consideration, and it was held that the lien for labor and material furnished upon a section of railroad in process of construction would extend over the entire road.

The language of the statute in that case was as follows: "The lien for the things aforesaid, or work, shall attach to the building, erections, or improvements for which they were furnished, or done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put," etc.

It will be observed that in express terms the lien is confined to the building on the land upon

which the same is erected. The Court put the decision upon the ground that the road was an entire improvement, notwithstanding that it was built in sections. The Court said (page 451): "It is not easy to see how it can be held to be one road for the purposes of the mortgage and two or three pieces of road for the purposes of the mechanic's lien." This was in view of the fact that other portions of the road were built under a different contract.

The case of *Canal Company v. Gordon* is distinguished upon the ground above stated.

In *Beatty v. Parker*, 141 Mass., 523, it was held that a drain-pipe, extending from the cellar of a house into a sewer in the street, was a part of the house, for the laying of which a mechanic's lien could be maintained, and that it was immaterial that the fee of the street was not in the owner of the house. The Court said:

"The piping inside of the house, and outside of it to the sewer, was necessary to the use of the house and a part of it, and was included in the contract for building it. The house would be incomplete and unfinished without the pipe, and it would pass by a deed of the house as a part of it. It is immaterial whether it was inside or outside the walls of the house, or whether it was above ground or under ground, or whether it extended one foot or thirty feet. It is immaterial also whether the fee of the land in the street was or was not in the owner of the lot. It must be

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assumed that the pipe was rightfully laid to the sewer, even if the fee of the street was not in the respondent. The pipe did not become the property of the owner of the fee of the street, but belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe, which could pass by a deed of the lot."

Taking into consideration the character of the plant as an entirety, we hold that the mechanic's lien extended over each and every part of it.

The next question presented is, whether the fees of the attorneys for the assignee are paramount to the lien of Mrs. Perry.

The company failed and made an assignment, and a bill was filed by the assignee to have the property sold, and to adjust the claims and liens of creditors.

The attorneys of the assignee have resisted in the lower Court and here the lien of Mrs. Perry. The Chancellor decreed that a portion of the fees for services rendered should be paramount to the liens of mechanics and furnishers.

From this decree no one appealed but Mrs. Perry, and she alone can now raise that question in this Court. Her rights were fixed by statute. The filing of the bill did not in any way benefit her. On the contrary, the whole proceeding was hostile to her interest.

In *Hays v. Dalton*, 5 Lea, 560, it was held that "the lien of counsel of complainant upon the rents of a tract of land recovered, which had been

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sold under void judicial proceedings, is inferior to that of the purchaser upon the excess of such rents over betterments and taxes for the repayment of his purchase-money at such void sale."

In *Pierce v. Lawrence*, 16 Lea, 572, the Court held that the lawyer's lien on land will not affect the rights of any other person having a prior lien.

In *Blackman v. Clarke*, 1 Pickle, 507, the attorney's lien was confined to the ultimate recovery to his client, and limited to the surplus after the paramount claim was paid.

The assignee, in this case, took the property subject to the mechanics' liens, and his rights would be limited to the surplus after they are satisfied.

In this case Mrs. Perry has employed her own counsel to establish her lien against the resistance of the attorneys of the assignee.

The decree of the Chancellor was erroneous in reducing the fund to which she looked by taxing it with a portion of counsel fees. The case will be remanded for further proceedings in accordance with this opinion.

The Bank v. Bond.

THE BANK v. BOND.

(Nashville. January 3, 1891.)

ESTOPPEL. *Of policy-holder to claim insurance money due upon a fire policy.*

Father and son owned house and lot jointly—the former two-thirds and the latter one-third. After the father's death the son insured the house, taking policy to himself and mother. The son paid all premiums. The father's estate was insolvent, and in proceedings brought by the administrator to wind it up the son presented and was allowed two-thirds of the premiums he had paid as a debt against the estate. After decree for sale of house and lot, but before sale thereof, the house was burned. The son received full amount of the policy, and refused to account to his father's estate for any part of it.

Held: That the son is estopped to claim two-thirds of the insurance money as against the administrator and creditors of his father's estate.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

STOKES & STOKES for Bank.

BRYAN & CARTWRIGHT for Bond.

LEA, J. D. L. Bond and J. D. Bond were joint owners of an improved lot in Nashville, D.

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L. Bond owning a one-third undivided interest, and J. D. Bond two-thirds. J. D. Bond died several years ago, and his personal estate being insolvent, a bill was filed in the Chancery Court of Davidson to subject the above two-thirds interest for the payment of debts.

The defendants to this bill, being a son and widow, filed a cross-bill, seeking to set up certain debts they claimed were owing them. Among the claims presented by D. L. Bond was an account for premiums on insurance he had paid on said property for several years from the death of his father up to and including the year 1890, claiming that the estate of J. D. Bond was indebted to him for two-thirds of the amount of said premiums for insurance on said property, and he recovered a decree for same, together with other claims against the estate, in his favor; and said two-thirds interest was ordered to be sold to pay this decree and decrees in favor of Maggie J. Bond and the complainant bank.

After the decree of sale, and before its execution, the improvements upon the property were burned, and defendant, D. L. Bond, collected the insurance money. The property was insured for two thousand dollars, and the policy was taken out in the name of "D. L. Bond and Maggie J. Bond, guardian," etc.

The property was afterward sold, but did not bring a sufficient amount to pay the decrees in favor of defendants and complainant bank; and

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defendant, D. L. Bond, declining to allow any part of the insurance money as a credit upon his decree, or to account for same, complainants, as administrator and creditors of J. D. Bond, file this bill, alleging the above facts, and seeking to force D. L. Bond to account for the insurance money so collected by him. The defendants demurred. The demurrer was sustained, and the bill dismissed. The insurance company is not a party to this suit.

That D. L. Bond and the other heirs of J. D. Bond had an insurable interest in said property cannot be denied; and if the policy had been taken out in their favor, with the intention to insure any interest they might have in the buildings, and they had paid for the same indicating such intention, then they would be entitled to the insurance; or if the policy had been taken out in their names, and nothing further appearing, such intention would be presumed, and they would be entitled to the insurance. But in this case D. L. Bond took out the policy and paid the premiums. Mrs. Maggie J. Bond never paid any part thereof, as guardian or otherwise, either to the company or to D. L. Bond. For two-thirds of the amount of premiums D. L. Bond recovered a decree against the estate of J. D. Bond, on the ground that the estate was indebted for that amount paid out for the estate.

As before stated, Mrs. Maggie J. Bond does not appear to have ever had any thing to do with the insurance, but she joined D. L. Bond in a

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cross-bill, in which he sought and did recover two-thirds of the premiums paid by him against the estate of J. D. Bond, on the ground that the insurance was for the estate. We hold that, insisting upon and recovering a decree against the estate of J. D. Bond, he is now estopped to claim the insurance money against the creditors of the estate. If it was the intention of the said parties to insure the property for the benefit of the estate, as it must have been to entitle D. L. Bond to a recovery against the estate, then the creditors are clearly entitled to the proceeds, and he will be compelled either to pay into court two-thirds of the insurance money collected, or to credit that amount on his decree against the estate of J. D. Bond, it appearing from the statements of the bill that in the event this is done there will be a sufficiency arising from the sale of the land to pay all creditors.

The demurrer is overruled, and the cause remanded for further proceedings. Defendants will pay cost.

Nelson v. Fuld & Co.

NELSON v. FULD & Co.

(Nashville. January 3, 1891.)

ATTACHMENT. *Affidavit. Information and belief.*

Attachment should be quashed on motion for want of sufficient cause for its issuance, where the affidavit states no more than that the creditor "is informed and believes" that his debtor "has fraudulently disposed of, or is about fraudulently to dispose of his property," without averring as matter of fact that the debtor had made, or was about to make, such fraudulent disposition.

Case cited and overruled: Lester v. Cummings, 8 Hum., 384.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

JOHN RUHM & SON, WILKIN & CHAMBERLIN, and
NATHAN COHN for Complainants.

M. & R. VAUGHN, BAXTER SMITH, and HILL &
GRANBERY for Respondents.

SNODGRASS, J. The complainant sued out in the
Chancery Court an attachment which was levied

upon the goods of defendant. It issued upon allegation "that complainant is informed and believes that said Fuld & Co. have fraudulently disposed of or are about fraudulently to dispose of their property," and without averment that defendant company had done the one or was about to do the other.

On motion, the attachment was quashed by the Chancellor because the allegation referred to was not sufficient to authorize it. Final decree being rendered, complainant appealed, and assigned error upon the action indicated.

Such a statement of information and belief that a defendant was about to remove his property beyond the limits of the State, without an actual averment that the fact was so, was held good in *Lester v. Cummings*, 8 Hum., 384.

If that case stands, the decree is erroneous; if not, the decree is correct, and must be affirmed.

The Court is of opinion that the question was incorrectly determined in that case, and the majority of the Court thinks it should be overruled. There and here there was and is no averment that defendant had taken or was about to take any action authorizing an attachment. It was not averred there that defendant was about to remove his property from the State, or here that the defendant company had fraudulently disposed of property or was about to do so, even upon information and belief.

The statement is only that the information has

been had and the belief exists. If defendant should traverse the allegation by plea denying that complainant had any such information or belief, he would deny all that is averred, and manifestly make no issue. If no issue can be made by denying all that is stated, it is difficult to see how such statement is material. Again, it may be true that a complainant is informed and believes that a defendant is about fraudulently to dispose of property, but it could not be sufficient to sustain an attachment to show that he had such information and believed it without more, and if proving the allegation made could not sustain the attachment, the allegation is insufficient. Then, suppose an indictment for perjury upon the falsity of averment as to fraudulent conveyance is sought to be preferred. The averment is produced. It is not that there has been such a conveyance; it is only that complainant had such information and belief. No indictment would therefore lie, and, if it would, it would be defeated upon proof that defendant had heard the fact to be so and believed it. It cannot be pretended that such a statement is the equivalent of the averment of the fact upon information and belief, and the majority of the Court holds that it is not proper to longer force such a meaning upon it; and, the question being directly made, now determines such construction to be erroneous, and overrules the 8 Humphreys case.

I dissent, because, while as an original question I think the present the sounder view, the 8

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Humphreys case has been long followed and acquiesced in, and I deem it the proper policy not to disturb it.

The result is an affirmance of the decree, with costs.

Harvey, Adm'r, v. Harrison.

89	470
110	220
110	221

HARVEY, Adm'r, v. HARRISON.

(Nashville. January 6, 1891.)

1. LIFE INSURANCE. *Upon husband's life for wife's benefit exempt from his debts.*

Although the widow alone is named as beneficiary in a policy of insurance taken by the husband upon his own life, yet the insurance is exempt to her from all claims of his creditors by virtue of the statutes declaring exemption of insurance upon husband's life in favor of his "widow and children," or of his "widow and next of kin."

Code construed: §§ 3135, 3335, 3336 (M. & V.); §§ 2294, 2478, 2479, (T. & S.).

2. SAME. *Same. Exemption valid without regard to amount.*

And the exemption created by these statutes is valid without regard to the amount of the insurance. The statutes have placed no limit upon the amount, and the Courts can fix none.

3. SAME. *Same. Exemption valid notwithstanding assured's insolvency.*

And the exemption is valid against creditors existing at inception of the insurance, although the assured was then and continued to be insolvent, devoting his entire estate in payment of premiums. The exemption is unconditional, and its express object was to withdraw a fund from creditors for the benefit of the debtor's family.

Case cited and approved: *Rison v. Wilkerson*, 3 Sneed, 568.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

Harvey, Adm'r, v. Harrison.

VERTREES & VERTREES and A. A. SWOPE for Harvey.

DEMOSS & MALONE for Harrison.

DICKINSON, Sp. J. In 1875 George W. Harrison became bound to Matthew Cowan on a replevy bond. From 1882 to 1886, being insolvent, he insured his life in various sums aggregating \$58,000, paying therefor in premiums a sum of money larger than the debt claimed in this suit. In 1886 he died. His wife, the defendant, who was named as the beneficiary, realized \$57,000 on the policies. In 1888 the personal representative of the estate of Cowan obtained a judgment for \$4,000 against the estate of Harrison on said bond, and there was a return of *nulla bona*. This bill is brought to subject the insurance money to the satisfaction of this judgment, on the theory that Harrison, by devoting his entire estate in payment of the premiums purchasing this insurance, fraudulently disposed of his property, and that, to the extent of the premiums so paid, the fund arising from them should be subjected to the claim of complainant.

Defendant relies for protection on §§ 3135, 3335, and 3336 of the Code, as follows:

"§ 3135. A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors."

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"§ 3335. Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distribution, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise."

"§ 3336. Whenever a married woman causes a life insurance to be effected upon her husband's life it shall in no case be subject to execution or attachment for the debts of the husband, but shall inure to the benefit of the widow and children."

For complainant it is contended that these sections provide that the life insurance contemplated by them shall go to the widow and children, or widow and next of kin, and that the exemption covers only such insurance as is so distributable, and that consequently they cannot be held to apply to these policies, which, by their express terms made the wife the sole beneficiary.

In construing the statute the amount of insurance effected can have no weight. The Legislatures of other States have limited the amount of insurance so protected, but there is no such restriction in Tennessee. The statute must be read the same whether the policy be great or small. The rule that would defeat the exemption in this case would likewise defeat it if the amount were but \$1,000 instead of \$57,000. The fact of in-

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solvency cannot be looked to; for the exemption is unconditional, and its express object was to withdraw a fund from creditors. If the policies had been payable to Harrison's estate, without any stipulation as to the wife, the creditors could have set up no claim to it. *Rison v. Wilkerson & Co.*, 3 Sneed, 568.

If it had been to the wife and children, the basis on which complainant predicates his argument would not exist.

The wrong charged did not, then, consist so much in withdrawing the fund from creditors as in the manner of its bestowal. The creditor could be hurt no more by the wife being sole beneficiary than by the children sharing with her, as undoubtedly might have been accomplished in either of the two ways named.

If the insurance had been made payable to Harrison's estate, and had so continued, the creditor could not have touched it before or after death; but if such policies (being a fund intangible by creditors) had been assigned by Harrison to his wife, then, *ipso facto*, under the argument advanced, the wrong is consummate, and the creditor's right attaches. In this way he would be benefited by the alleged fraud, which in fact consists only in transferring to the wife a fund which he could not have subjected in any way. He could not restrain such transfer by alleging it to be a fraudulent disposition of property, for such right is limited to what he might reach if not trans-

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ferred. He could not be injured by his debtor alienating what was already beyond his reach. Such alienation would neither give the creditor a right in the fund, nor a right of action against the transferee. If this were true, then instead of a fraudulent disposition of property to defeat creditors, it would be a fraudulent disposition for the benefit of creditors. The proposition, if correct, is a startling legal paradox. If the husband, as shown, can take out the policy in his own name and safely transfer it to his wife, then how does it injure the creditor to take it in her name in the first instance?

Under the construction contended for, a father could not provide for his dependent minor children if they were motherless, because there would be no widow to share in the distribution; and, inasmuch as the statute (as is claimed) only contemplates insurance distributable to widow and children, it could not be held to apply to a fund where there was no widow to share in it.

The wife of a husband having no children and taking out a policy in his own name, would, under the statute of distributions, be sole beneficiary; then, why should there be any difference if he, in the first instance, should make her the beneficiary in the policy? It could not injure creditors to take out the policy in her name instead of his when the policy, if taken in his name, would, under the statute, be paid to her. If this could be legally done, and afterward children should be

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born to them, and he should die leaving a wife and children, then, because the children could not share, the statute (as is contended) would not protect the policy, and what was before perfectly shielded would, by the mere fact of the birth of children, become subject to creditors as property fraudulently disposed of.

Apply this method of literal construction to § 3336, which provides:

“§ 3336. Whenever a married woman causes a life insurance to be effected upon her husband's life, it shall in no case be subject to execution or attachment for the debts of the husband, but shall inure to the benefit of the widow and children.”

If the wife effect the insurance with her separate estate, shall it inure to the benefit of the children? If she effect it with money given by the husband, but in her own name, shall we say that it shall not inure to the benefit of the children? The statute says it shall inure to their benefit, and no limitations are expressed as to source of premiums or the form of policy. These questions are suggestive of the difficulties involved in applying to such statutes a narrow principle of hermeneutics, which deals merely with the language and ignores the policy that inspired them. If she effect it in her own name, shall it for this reason be subject to the husband's creditors? We do not think that the words relied on as controlling the application of the exemption were used for any such purpose. They were not intended to

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limit the scope of the statute nor to protect the rights of creditors, but simply to provide for the disposition of the fund in the event of its becoming a part of the estate. In the absence of a disposition of it by the husband, this provision was proper to fix the relative rights of the wife and children and take the fund out of the administration immediately for their benefit. The primary purpose of the Act was to exempt life insurance from the claims of creditors, and this is expressed in emphatic and conclusive language. The secondary purpose was to provide for the disposition of this fund. The words inserted for this subordinate intent, dissimilar from the primary object of the Act, will not restrict the scope of the Act in its main intent. The purpose of the enactment is clear, and this must guide in its application. It was to enable a husband or father to provide a fund after his death for his family. Whether the contract be in his own name, or for his wife and children, or in the name of the wife alone, can make no difference to creditors, for the same amount can be withdrawn from them in premiums under either form of contract, and the manner of distribution does not concern them. After the father, the mother is the head of the family. It is often the highest wisdom to intrust her with the means of supporting and educating her children and securing their dependence and obedience. To defeat the possibility of such provision, and force all insurance for the benefit of the family to be

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taken out so as to be distributable among the children, and say that the husband cannot insure for the benefit of his wife alone, upon the construction contended for, would be to sacrifice the spirit of a law belonging to that class which, as said by Judge Green in *Bachman v. Crawford*, 3 Hum., 216, "ought to be so construed as to advance the remedy the Legislature intended to afford."

The decree is affirmed.

Judge Snodgrass dissents.

GLASS v. BENNETT.

(Nashville. January 8, 1891.)

1. EVIDENCE. *Corroborating witness by proof of his previous consistent statements.*

Where witness is assailed by proof tending to show his statement on oath a recent fabrication or inconsistent with his previous representations, it is competent to support his credit by proving that he gave the same account of the transaction at a time when he had no motive to misrepresent the facts. Examples of the proper application of this rule occur in this case.

Case cited and approved: *Hayes v. Cheatham*, 6 Lea, 10.

2. SAME. *Res gestæ. What admissible under.*

In husband's suit to recover damages of wife's father and brother for wrongfully causing separation and estrangement of his wife, it is competent, under issue made by plea of not guilty, to prove as part of the *res gestæ* all declarations of the wife explanatory of her mental trouble, and of her conduct in leaving and remaining away from her husband, whether made at the time of the separation or subsequently while it continued, and whether made to her husband, her physician, members of her father's family, or to strangers.

3. DOMESTIC RELATIONS. *Parent and child. Husband and wife. Brother and sister.*

"The father and brother are natural protectors of the daughter and sister." The father may lawfully give honest advice to his married daughter who comes to him in distress growing out of unhappy marital relations, and he may shelter her in his own home so long as she freely remains.

Case cited and approved: *Payne v. Williams*, 4 Bax., 585.

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4. SUPREME COURT PRACTICE. *Transcripts. Clerk's fees.*

Hereafter clerk's fees for making transcripts of record for this Court will be stricken out if the work is not done in a proper manner.

Cited: Rules, 85 Tenn., 751.

5. SAME. *Suggestion as to making bills of exceptions.*

Bill of exceptions in a law case should not contain full report of the evidence in all its details, but only such facts as are material with reference to the questions to be made in this Court.

FROM WILLIAMSON.

Appeal in error from Circuit Court of Williamson County. W. K. McALISTER, J.

JESSE G. WALLACE, DEMOSS & MALONE, and HEARN & BERRY for Glass.

H. P. FOWLKES, THOMAS & HOUSE, JOHN H. HENDERSON, and N. N. COX for Bennett.

TURNER, Ch. J. This suit began in the Circuit Court of Williamson County on December 27, 1889. The cause of action is digested by Bennett's attorneys as follows:

"*First Count.*—That on the — day of March, 1889, the plaintiff being a married man, as he had been since May 18, 1881, and living with his

wife, Laura Bennett, who was the daughter of Defendant S. F., and sister of Defendant W. H. Glass, enjoying the comfort, affection, companionship, and service of his said wife, and having a household, the said defendants conspiring together and intending to prejudice and aggrieve the plaintiff as such husband, and deprive him of the comfort, affection, etc., of his said wife, wrongfully and unjustly intending to break up plaintiff's household, and to degrade and injure him in the esteem of his neighbors and of the public, * * * did unlawfully, wrongfully, and unjustly entice, persuade, and procure said Laura Bennett * * * to depart from and out of the companionship and service of the plaintiff, by means of property, in order to render plaintiff houseless and homeless, and by false and untrue statements concerning plaintiff, made by them to plaintiff's wife and others, derogatory of plaintiff's character, intending to bring the plaintiff into disrepute and disgrace in the estimation of his wife, and did thus alienate and destroy the love and affection of his wife for him, and caused her to abandon him and take with her their only child, thus destroying the happiness, peace, comfort, and family relations of plaintiff, and depriving him of the society of his wife," etc.

The defendants plead not guilty, upon which issue is joined.

There was a trial before a jury in the Circuit Court, of Williamson County, at the April Term,

1890, and a verdict was rendered in favor of the plaintiff in said Court and against defendants for twenty thousand dollars.

On the motion for a new trial the Circuit Judge, having intimated that he entertained doubts as to the excessiveness of the verdict, plaintiff entered a *remittitur* of \$7,500. Thereupon the motion for a new trial was overruled, and defendants appealed.

On the trial Mrs. Bennett, wife of plaintiff, testified that she followed her husband to the front gate and up the pavement, begging him to promise her that he would not take her daughter Agnes from her if she brought her home, and that he would not make the promise.

The husband denied the statement. It was proposed, then, to prove by Mrs. Richardson that she saw Mrs. Bennett follow her husband, and heard her begging him piteously to tell her something, she did not hear what. She afterward asked Mrs. Bennett what she was begging him for, when she told her as Mrs. Bennett stated on the witness-stand.

On objection, the evidence was ruled out. This was error. "The rule is, that when it is attempted to be established that the statement of a witness on oath is a recent fabrication, or when it is sought to destroy the credit of the witness by proof of contradictory representations, evidence of his having given the same account of the matter at a time when no motive existed to misrepresent

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the facts ought to be received, because it naturally tends to inspire confidence in the sworn statement." 6 Lea, 10.

The declarations of Mrs. Bennett, made at the time she left her home, explanatory of her troubled mental condition and of her reasons for going to her father's house with her child, are competent as parts of the *res gestæ*, and also to corroborate her when the effort has been made to discredit her statement as a witness.

Mrs. Bennett's declarations to her father, mother, and brother, or others, assigning causes for leaving her home and returning to her father's, and remaining there, are competent, going to establish or disprove a justification on the part of the defendants, or either of them, in advising her, if they did so, to remain away from her home and husband.

Any advice given to the husband to leave Mrs. Bennett and go to Texas, if communicated to her and not repelled at the time by him, especially if given before the separation, is competent.

Every thing that can legitimately inculpate or exculpate the father and brother on the one part, or the husband and his sisters and brothers-in-law on the other, is competent for the consideration of the jury in the trial of the facts raised by the issues.

It will be proper for the jury to consider of the hypothesis of the guilt of the father and brother, or either of them, in connection with one of the guilt of any other person or persons.

The question is, What brought about the estrangement and separation? whose advice and conduct accomplished them? Was the fault in the husband, because the father was unwilling to intrust him with the control of property intended for the daughter? Was property the incentive to the husband to live with and properly treat and respect the wife? Was the exercise of ownership by the father the cause of the husband maltreating his wife? If so, the blame is with him, and the father and brother are justified in protecting and providing for the wife.

All these questions are presented by the record, and whatever throws light upon them from the conduct of kinsman or stranger is matter of legitimate inquiry.

The father and brother are natural protectors of the daughter and sister.

In *Payne v. Williams*, 4 Bax., 585, Judge Deadrick, delivering the unanimous opinion of the six Judges, said:

"There can be no law to restrain the parent from honestly and sincerely endeavoring to protect his daughter, by means of counsel and warning, from impending ruin or disgrace or wreck of her happiness or usefulness for life. There is a marked distinction between the rights and privileges of a parent in such cases and those of a mere intermeddling stranger. A father has no right to restrain his daughter from returning to her husband if she desires to do so. On the other

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hand, he may lawfully give counsel and honest advice for her own good, and shelter her in his own house if she chooses to remain with him." Citing Schouler on Dom. Rel., 57, 58; 21 Barb., 439; 5 John., 196.

We adhere to this statement of the doctrine, and heartily approve it.

Under this rule, if the father, after hearing the complaint of the daughter, gave her counsel and honest advice for her own good, as he believed it to be, and sheltered her in his own house, she choosing to remain with him, he violated neither law nor morals, but did just what any honest, good father, with any of the spirit of a true man, will always do—a course of conduct that cannot and should not be discountenanced by legislation or adjudication. The law of natural affection and natural duty is a higher law that will not submit to a remolding by human agencies. The right of the father to give honest advice to and shelter his daughter conserves the peace; take it away, and homicide may become its successor.

It was error to withdraw from the jury the statement of Dr. Clift as to the mental and physical condition of Mrs. Bennett in spells of sickness in which he was her attending physician, as, in connection with other facts stated by him, it tended to show that the indifference and inattention of the husband induced or provoked the mental depression of the wife, and, to that extent, fortified the theory of the defense that Mrs. Ben-

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nett was driven from her home by the unkind treatment and neglect of her husband.

The proof shows that Bennett repeatedly threatened to take the child and go to Texas. It was error to sustain an objection to a question to Bennett as to whether his sister had not advised him to do so. The testimony was competent under the rule already stated as well as to sustain Mrs. Bennett, who had so testified.

As this record presents the facts, we see no sufficient evidence to support the verdict.

This is a proper case in which to call attention to the rules for making the transcripts for this Court. 1 Pickle, 751. Over one thousand pages of this record are type-written. Very much of it is so written as to make it almost impossible to be read; much of it so dim that it can only be read by daylight. In many instances the letters are about half formed. We have had a great deal of such annoyance lately, and we call attention to it now that clerks may look to their interests as well as duty. In the future no fees will be allowed for such transcripts.

It seems that the evidence was taken down by short-hand, and then copied as a bill of exceptions. It gives, at the lowest estimate, twice the amount of reading matter necessary to be brought to this Court, besides imposing unnecessary expense on the litigants. It was the duty of the attorneys to have gone over the copy and extracted from it such facts as were material to bring the issues

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properly before the Court, and no more. The business of the Court is too large to require the Judges to wade through the vast amount of immaterial matter to reach the merits.

Often matter that could be readily stated in a half-dozen lines is spread over as many pages. Every question, every remark, is copied, and the Court is required to do, in a press of work, the labor the lawyer could have done at leisure, and which it was his duty to do.

For the errors of law indicated the judgment is reversed, and the cause remanded.

Williams v. Nashville.

WILLIAMS v. NASHVILLE.

(Nashville. January 10, 1891.)

1. CONSTITUTIONAL LAW. *Special laws affecting municipal corporations are valid.*

The territorial limits of an existing municipal corporation may be extended by a special law enacted for that sole purpose. Such Act is not within the constitutional prohibition that "no corporation shall be created, or its powers increased or diminished by special laws." This clause of the Constitution applies, not to municipal, but alone to private corporations.

Constitution construed: Art. XI., § 8.

Act construed: Acts 1890 (extra session), Ch. 33.

Cases cited and approved: *State v. Wilson*, 12 Lea, 246; *Ballentine v. Pulaski*, 15 Lea, 633.

2. SAME. *Same. Co-existent general and special laws.*

Although the general laws, and also the charter of the particular municipal corporation, have provided ample methods by which its boundaries might be extended without resort to further legislative action, yet the Legislature has the power to accomplish that end by special statute. Special laws of this character are not within the constitutional prohibition that "the Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land."

Constitution construed: Art. XI., § 8.

Cases cited and approved: *Luehrman v. Taxing District*, 2 Lea, 433; *State v. Wilson*, 12 Lea, 257.

3. SAME. *Same. Not deprivation of liberty or property.*

A special law extending territorial limits of a municipal corporation does not operate to deprive the owners of the included property either of liberty or property, and does not therefore violate the

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constitutional provision "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor;" or that other constitutional provision "that no man shall be * * * deprived of his life, liberty, or property but by the judgment of his peers or the law of the land."

Constitution construed: Art. I., §§ 8, 21.

Case cited: 67 U. S., 510.

4. SAME. *Same. Same.*

Nor does such statute violate that clause of the Federal Constitution which provides that "no person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Constitution construed: Fifth amendment Federal Constitution.

5. SAME. *Passage of laws at extra session previously rejected at regular session.*

The rejection of a bill at its regular session does not debar the Legislature from passing one, substantially the same, at a subsequent extra session of the same body, authorized by the Governor's call to legislate upon that particular subject. In the constitutional provision that "after a bill has been rejected, no bill containing the same substance shall be passed into a law during the *same session*," the word "session" means "the space of time between the first meeting and the final adjournment of each particular sitting or term."

Constitution construed: Art. II., § 19.

6. STATUTES. *Passage of. Fraud. Motives.*

A statute regularly enacted by the Legislature cannot be declared void by the Courts upon the ground that its passage was procured by fraud.

Cases cited and approved: *Lyln v. Polk*, 8 Lea, 229; *Ballentine v. Pulaski*, 15 Lea, 634.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

Williams v. Nashville.

COLYAR, WILLIAMSON & COLYAR and JOHN L. NOLEN for Williams.

J. M. ANDERSON, City Attorney, and ANDREW J. CALDWELL for Nashville.

CALDWELL, J. By Chapter 33 of Acts passed at the extra session of 1890, the General Assembly undertook to annex certain territory to the city of Nashville. The outer limits of the territory so annexed is defined by a very irregular line, with numerous angles, including and excluding property equally near the heart of the city, without any apparently good reason therefor. In two instances property belonging to manufacturing corporations, and situated near the interior of the annexed territory, was excluded by the exclusion of narrow strips of ground connecting that on which the factories and other buildings stand with the territory in the county.

The complainants owned property situated within the boundaries of the annexed territory. They brought this bill to restrain the city from collecting taxes and exercising municipal control over their property, and for general relief, on the allegation that said Act of Assembly is unconstitutional and void for several reasons specified.

The bill was dismissed on demurrer, and complainants have appealed, and assigned errors.

First.—It is insisted that the Act in question, being a special law, falls within the constitutional

prohibition that "no corporation shall be created, or its powers increased or diminished, by special laws" (Const., Art. XI., Sec. 8, clause 2), and that it is therefore void.

Without entering into a discussion of this provision of the Constitution, we content ourselves with a citation of cases in which it has been adjudged to apply only to private and not to municipal corporations. *State v. Wilson*, 12 Lea, 246; *Ballentine v. The Mayor and Aldermen of Pulaski*, 15 Lea, 633.

Second.—Nashville's present city government was organized under the one hundred and fourteenth chapter of the Acts of 1883. The forty-eighth section prescribes the mode in which territory adjoining any municipal corporation organized thereunder may be brought within its corporate limits. Sections 1601 and 1602 of the Code also prescribe the mode in which "territory adjoining any municipality may be added thereto and included in the corporate limits thereof."

It is contended that these are general laws, and that, so long as they remain upon the statute books unrepealed, there are no other means by which the corporate boundaries of any town or city can be enlarged; that the Act impeached is void, because inhibited by the first clause of Section 8, Article XI., of the Constitution, which is in these words: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law

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for the benefit of individuals inconsistent with the general laws of the land."

The statutes referred to are general laws in the sense that they present the same method of annexation to citizens and freeholders in territory to which they apply, respectively, throughout the State; but, pertaining, as they do, exclusively to municipalities in their political aspect, which may always be controlled as well by special as by general legislation, they do not stand in the way of the Act in question here, or render it unconstitutional. By their passage the Legislature did not surrender, and could not have surrendered, its power and obligation to enlarge or diminish the corporate limits of any town or city whenever the public exigency demands that it should be done. Incorporated towns and cities are but arms or instrumentalities of the State government—creatures of the Legislature—and subject to its control at will. It may establish and may abolish at pleasure. *Luehrman v. Taxing District*, 2 Lea, 433, and authorities there cited; 12 Lea, 257; 4 Pickle, 293; Cooley's Const. Lim., 230, 231.

To hold that the Legislature could not enlarge the corporate limits by an Act passed for that purpose, would be to deny that it could create or abolish; for the greater includes the lesser in law, as in mathematics.

Again, the Act complained of is not inconsistent with the general laws of the land, because by those laws the power to create or abolish, enlarge

or diminish, municipalities is reposed in the Legislature.

The power of annexation by a prescribed method, was conferred on citizens and freeholders concerned, and, at the same time, the inherent power of annexation by special Act, was left in the Legislature; the situation was as that of two laws co-existing, by either of which the same result might be accomplished, and in which resort to one would not be inconsistent with or a suspension of the other.

Third.—It is contended that this Act is void because in conflict with the fifth amendment to the Constitution of the United States, which provides that “no person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation;” and also because in conflict with similar provisions of the Constitution of the State of Tennessee, “that no man shall be * * * deprived of his life, liberty, or property but by the judgment of his peers or the law of the land” (Art. I., Sec. 8); and “that no man’s particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor.” Art. I., Sec. 21.

As a matter of course, the Act would be inoperative, null, and void, if, in fact, it violated any of those provisions. But it cannot be that

it does so. The extension of corporate limits so as to include additional territory is in no sense an impairment of the owner's liberty, nor is it a taking of private property for public use. If it were held to be so, then no municipal corporation could be established or enlarged, and none of these valuable instrumentalities of the State would have a lawful existence:

Even the statutes of annexation to which complainants ascribe the sanctity of general laws, would be utterly unavailing for the same reason.

Placing property within the corporate limits of a given town or city, where it will be subjected to the additional burden of municipal taxation and supervision, is not a *taking* of the property at all. The ownership is in no degree changed, and the increased burden is presumed to be equalled by the increased advantages.

"Eminent domain differs from taxation in that in the former case the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit." Cooley's Const. Lim., 693.

"Taxation, however great, for a public purpose is not a taking of private property for public use within the meaning of a constitutional provision prohibiting such taking." 6 Am. and Eng. Ency. of Law, 562; *Gilmore v. The City of Sheboygan*, 2 Black (67 U. S.), 510.

Fourth.—The act assailed was passed at an *extra session*. A bill, in substance the same, had been

passed by the House of Representatives and rejected by the Senate at the *regular session*. Therefore it is alleged in the bill, and insisted in argument, that it was not a competent subject for legislation at the extra session, though embraced in the Governor's proclamation for an extra session as required by Section 9 of Article III. of the Constitution.

The position is that the power of that General Assembly—that particular body of Representatives and Senators—to legislate upon that subject was exhausted by the action taken at the regular session, and that the proclamation of the Governor could not restore that power.

If it be true, as assumed, that the General Assembly exhausts its constitutional power of legislation on a given subject for the full term of two years, by the rejection of a bill at the regular session, then it is manifest that the Governor cannot revive that power, and make it effective for an extra session; but that legislative power may be exhausted in that way, and to that extent, we do not admit. The language of the Constitution applicable to the case is as follows: "After a bill has been rejected no bill containing the same substance shall be passed into a law during the *same session*." Art. II., Sec. 19.

"Session," as here used, means a particular sitting of the General Assembly; as, a *regular* sitting for the transaction of general legislative business, or an *extra* sitting for the transaction of special

legislative business named in the Governor's proclamation. It is the space of time between the first meeting and the final adjournment of each particular sitting or term.

The Constitution virtually so defines the word. It provides for different sittings, and calls each of them a "session:" "But no member shall be paid for more than seventy-five days of a *regular session*, or for more than twenty days of an *extra or called session*," etc. Article II., Sec. 23.

Fifth.—It is alleged that this Act was conceived and its passage procured by private persons for sinister motives; that the lines were irregularly and arbitrarily run (as described on the first page of this opinion) for the purpose of oppressing complainants by including their property, and favoring certain rich corporations and wealthy persons by excluding their property; that this was the result of an agreement between the persons and corporations to be excluded and a few members of the Legislature, and was a *fraud* on the Legislature and on the rights of property owners included.

The facts here charged, if admitted to be true (as they are by the demurrer), do not render the Act void.

That a bill is inspired by private persons for their own advantage, and to the detriment of others, is clearly not a sufficient reason for holding the law void when passed. Nor can the Courts annul a statute because the Legislature passing it was imposed upon and misled by a few

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- of its members in conjunction with interested third parties. If the Act in question is unwise and oppressive, the evil may be remedied by repeal or amendment.

The Courts have nothing to do with the policy of legislation, nor the motives with which it is made. *Lynn v. Polk*, 8 Lea, 229, 293; 15 Lea, 634.

Affirm the decree.

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THE STRATTON CLAIMANTS v. THE MORRIS CLAIMANTS.

(Nashville. January 13, 1891.)

1. CONSTITUTIONAL LAW. *Measure and limits of legislative power in this State.*

In Tennessee it is a settled doctrine of constitutional law that "the legislative power of the General Assembly of this State extends to every subject except in so far as it is prohibited either by the delegated powers of the Federal Government or by the restrictions of our own Constitution. He who would show the unconstitutionality of an Act of the Legislature, must be able to put his finger upon the provision of the constitution violated." (*Post*, pp. 511, 512.)

Cases cited and approved: *Demoville & Co. v. Davidson County*, 87 Tenn., 220; *Davis v. State*, 3 Lea, 377; *Luehrman v. Taxing District*, 2 Lea, 438; *Hope v. Deaderick*, 8 Hum., 8; *Bell v. Bank, Peck*, 269, 270.

2. SAME. *Same.*

And therefore the Courts cannot annul a statute which is free from other exception, upon any assumption that it is opposed to the "eternal principles of justice," or to "natural equity," or to "the inherent rights of freemen," or to some vague and general spirit that is supposed to pervade the Constitution, but not expressed therein. (*Post*, pp. 511-513.)

Cases cited and approved: *Davis v. State*, 3 Lea, 378; *Luehrman v. Taxing District*, 2 Lea, 438.

Cited: *Bank v. Cooper*, 2 Yer., 603.

3. SAME. *Same. An important consideration.*

But, "in considering State Constitutions, we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. A Constitution is not the beginning of a community nor the origin of private rights; it is not the foundation of law nor the incipient state of government; it is not the cause, but the consequence, of personal and political

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freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made; it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought." (*Post*, pp. 512, 513.)

Cited: Cooley's Con. Lim., p. 358.

4. SAME. *Conditions existing at date of formation of our Constitution.*

When the Constitution of this State was formed, "the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance to our descendants in regular order and succession" was "enjoyed to the fullness and perfection of absolute right," and one of the objects of the Constitution was to protect and preserve this right. (*Post*, pp. 513-515.)

Case cited and approved: *Hughlett v. Hughlett*, 5 Hum., 464.

5. DESCENT AND DISTRIBUTION. *Act of 1885 changing laws of descent and distribution with reference to lunatics. Unconstitutional.*

Act of 1885, Ch. 88, changing our laws of descent and distribution with reference to estates of lunatics is unconstitutional and void. That Act provides that the personal estate of which a "lunatic or *non compos mentis*" dies intestate, if derived from an intestate husband or wife, shall go, not to the next of kin of such "lunatic or *non compos mentis*," as in case of other intestates, but to the next of kin of the person from whom the estate was derived. (*Post*, pp. 506, 507.)

Act construed: Acts 1885, Ch. 88.

6. SAME. *Same. Terms "lunatic or non compos mentis" defined.*

The terms "lunatic or *non compos mentis*" are used in this Act to denote a person who has not sufficient mental capacity to make a will. (*Post*, p. 507.)

7. SAME. *Same. Same. Sufficiency of the evidence.*

The evidence set out, in the Court's opinion, is held sufficient to establish that the intestate whose estate is involved was a "lunatic or *non compos mentis*" within the meaning of this Act. (*Post*, pp. 507-511.)

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8. CONSTITUTIONAL LAW. * *Act of 1885 does not deprive intestate lunatic's next of kin of property.*

This Act of 1885 does not deprive an intestate lunatic's next of kin of *property* within the meaning of the constitutional prohibition that no man shall be deprived of "his property but by the judgment of his peers or the law of the land," even when the Act is applied to a lunatic who, before its passage, had acquired personal estate of an intestate husband or wife, and continued to be a lunatic and died intestate after the Act had been passed. The expectancy of next of kin is not *property*. (*Post*, pp. 515-518.)

Constitution construed: Art. I., Sec. 8.

9. SAME. *But this Act deprives the intestate lunatic of property.*

But this Act of 1885, if valid, would deprive the "lunatic or *non compos mentis*" himself of that which is recognized as *property* within the constitutional prohibition aforesaid, to wit: The right to transmit his property by inheritance to his *own* descendents or next of kin. (*Post*, pp. 518-521.)

Constitution construed: Art. I., Sec. 8.

10. SAME. *Act of 1885 not valid, because it is not the "law of the land."*

A statute which deprives any one of property is not valid unless it is the "law of the land." This Act of 1885 is not the "law of the land," because (1) the classification upon which it is based is "unnatural, arbitrary, and capricious;" and (2) it operates to take private property for private use, contrary to an implied prohibition of the Constitution. (*Post*, pp. 541, 542.)

11. SAME. "Law of the land." *Definition of.*

"Law of the land" correctly defined means a law "which embraces all persons who are or may come into like situation and circumstances." It may be made to extend to all citizens, or be confined, under proper limitations, to particular classes. If the class be a proper one, it matters not how few the persons are who may be included in it. (*Post*, pp. 521-523.)

Constitution construed: Art. I., Sec. 8.

Cases cited and approved: *Vanzant v. Waddell*, 2 Yer., 270, 271; *Wally v. Kennedy*, 2 Yer., 555; *Bank v. Cooper*, 2 Yer., 605; *Jones v. Perry*, 10 Yer., 71, 72; *Sheppard v. Johnson*, 2 Hum., 296; *Budd v. State*, 3 Hum., 491; *State v. Burnett*, 6 Heis., 189; *McKinney v. Hotel Company*, 12 Heis., 107; *Mayor v. Dearmon*, 2 Sneed, 122; *State v.*

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Rauscher, 1 Lea, 97; Davis v. State, 3 Lea, 379; Maney v. State, 6 Lea, 221; Hatcher & Lea v. State, 12 Lea, 370; Woodard v. Brien, 14 Lea, 523.

12. SAME. *Same. Essentials to validity of statutes based upon classifications.*

"Whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary. If the classification is made under Article XI, Section 8, of the Constitution for the purpose of conferring upon a class the benefit of some special right, privilege, immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. If the classification is made under Article I., Section 8, of the Constitution for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be subject to the burden." (*Post*, pp. 522-535.)

Constitution construed: Art. I., Sec. 8; Art. XI., Sec. 8.

Cases cited and approved:

Sustaining statutes: Demoville v. Davidson County, 87 Tenn., 218-223; State v. Schlier, 3 Heis., 286; Fulghum v. Mayor, 8 Lea, 635; Robbins v. Taxing District, 13 Lea, 303; State v. Rauscher, 1 Lea, 96; Theilan v. Porter, 14 Lea, 627; Parks v. Parks, 12 Heis., 634; Davis v. State, 3 Lea, 380; Jones v. Perry, 10 Yer., 75.

Declaring statutes unconstitutional: Hatcher & Lea v. State, 12 Lea, 370-371; Morgan v. Reed, 2 Head, 275; Memphis v. Fisher, 9 Bax., 239; Brown v. Haygood, 4 Heis., 360; Wally v. Kennedy, 2 Yer., 554; Bank v. Cooper, 2 Yer., 599; Budd v. State, 3 Hum., 492; McKinney v. Hotel Company, 12 Heis., 104; Daly v. State, 13 Lea, 232; Burkholz v. State, 16 Lea, 72, 73; Woodard v. Brien, 14 Lea, 522; Neely v. State, 4 Lea, 316; Green & Currey v. State, 15 Lea, 708-710; Ragio v. State, 86 Tenn., 272.

13. SAME. *Same. Must not violate any provision of the Constitution.*

"A law which violates any provision of the Constitution, whether the provision be express or implied, cannot be the 'law of the land,' because an unconstitutional law is, in fact, no law at all." (*Post*, p. 536.)

14. SAME. *Same. Taking private property for private use prohibited by Constitution.*

"Though the Constitution does not expressly prohibit the taking of

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private property for private use, yet it has been held to do so by implication," and therefore a statute cannot be the "law of the land" which takes the private property of one person to give it to another for the latter's private use. (*Post*, p. 535.)

Constitution construed: Art. I., Sec. 8.

Cases cited and approved: *Harding v. Goodlett*, 3 Yer., 52; *Clack v. White*, 2 Swan, 549; *Memphis Freight Co. v. Mayor, etc.*, 4 Cold., 425.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
JOHN A. FITE, J., sitting by interchange.

DEMOSS & MALONE, N. D. MALONE, W. G. BRIEN,
STEGER, WASHINGTON & JACKSON, JOHN L. KENNEDY,
and VERTREES & VERTREES for Stratton Claimants.

MARKS & MARKS, EAST & FOGG, HILL & GRAN-
BERRY, and JOHN LELLYETT, JR., for Morris Claimants.

*ED. BAXTER, Sp. J. K. J. Morris, when about sixteen or seventeen years old, began mercantile life as a clerk in a store in Nashville. He was very poor, but, being industrious and economical, he saved money from his salary. In 1842 he married Jane M. Stratton. In 1845 he became a member of the partnership of Lanier, Morris & Co., and he contributed \$4,000 as his share of the capital of that firm. About one month before the forma-

*Ed. Baxter, Esq., of the Nashville Bar, was appointed by the Governor to sit at this term on the hearing of this case and some others in which some member of the Court was incompetent.

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tion of said partnership he and his wife sold a negro woman and three children for \$1,175. The negro woman had been bequeathed to Mrs. Morris by her aunt, but there is nothing to show that Morris used the proceeds of the sale in contributing his share to the capital of said firm, except the fact that his financial condition at the time renders it probable that he was compelled to do so. His connection with that firm was the foundation of his success, which, while slow, was steady and sure. His estate at his death was valued at over \$200,000.

The early years of his married life were as happy as they were prosperous. His wife was a home-staying, husband-loving woman. She was quiet and retiring in her disposition, industrious and economical in her habits. She made most of her own clothing, and much of her husband's underwear. She was an excellent house-keeper, and a fine manager. How much her wise and economical management of their household affairs may have contributed to her husband's financial success in life, we have no means of knowing.

She had but one child, a son, and he was her idol. In 1861, when he was about seventeen years old, he was accidentally killed, and she was never the same woman afterward. She withdrew from society, became gloomy and melancholy in her disposition, and would frequently fall into spells of uncontrollable weeping. In 1882 she was fearfully afflicted with carbuncles. The disease finally merged

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into catalepsy, and her mind became visibly and seriously impaired.

On April 19, 1884, her husband died intestate and without issue, leaving his wife surviving him. His real estate was valued at \$100,000 and his personal estate at \$120,000. According to the statutes of descent and distribution then in force, his real estate went to his heirs at law, and his personal estate went to his widow; and if those statutes had remained in force, and she had died intestate, unmarried, and without issue, the personal estate inherited by her from her husband would have gone to her next of kin.

On April 24, 1884, just five days after her husband's death, her brother, Madison Stratton, who is one of the complainants, filed a petition against Mrs. Morris in the County Court of Davidson County, in which petition he averred that she was then "a lunatic or a person of unsound mind," and had been for nearly or quite two years; and that, by reason of her mental infirmities as aforesaid, she was "entirely incapable of managing or in any way controlling her said property and estate, or of taking care of her own person." Mr. Kennedy, one of the solicitors who signed the petition, is the husband of one of the nieces of Mrs. Morris.

A guardian *ad litem* was appointed for Mrs. Morris, testimony was taken, and the jury of inquest found that she was a person of unsound mind, so that she had not capacity sufficient for

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the government of herself and her property; that the said unsoundness of mind and mental incapacity had "existed for about eighteen months, and that it resulted principally, if not wholly, from physical afflictions and from physical causes." The verdict of the jury was made the judgment of the Court on the first day of May, 1884, and a guardian of her person and property was appointed, who is the husband of one of her nieces.

She remained under said guardianship until her death. At the first session of the Legislature which met after she had been declared a lunatic, Mr. Robert L. Morris, a nephew of her husband, prepared a bill, which was passed by the Legislature April 1, 1885, as Chapter 88 of the Acts of 1885, the effect of which, if constitutional, will be to give the personal estate which Mrs. Morris inherited from her husband to her husband's next of kin instead of to her own, provided it shall be found that she was "a lunatic or *non compos mentis*."

Mr. Morris says that he spoke to five members of the Legislature regarding the passage of the law, explaining to them its scope and bearing, and its effect upon the estate of K. J. Morris. He spoke to them of the hardship of the existing statute of descent and distribution as illustrated by this estate, and that there was a chance to modify one of its defects; namely, that which gave all of an intestate husband's personal property to his widow in the absence of children.

Mr. Morris also talked with Governor Bate

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about the law, explaining to him, among other things, what effect it would have upon the estate of Mrs. Morris. The Governor said that he was equally friendly with the Stratton and Morris families, but would approve the law on its merits, as he regarded it a good law.

Mr. Morris says that he did not speak to any member of the Morris family about the introduction of the law, nor communicate with them in any way concerning it; but after its passage had been recommended by the judiciary committee, he mentioned it to several persons who were members of or connected with that family.

Mr. Morris charged no fee for any thing done in connection with the passage of the Act, and he never received any compensation for his services. There is nothing whatever in the record to even intimate that he resorted to any sinister methods to influence the action of the members of the Legislature.

On the other hand, there is nothing to show that any member of the Stratton family had any notice that such a bill had been introduced into the Legislature until after the Legislature had adjourned.

Mr. Kennedy states that Mr. Morris never told him of the law until Mr. Kennedy found it in the published Acts of 1885 and called his attention to it.

Mrs. Morris continued under guardianship until December 19, 1888, when she died intestate, unmarried, and without issue.

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On December 20, 1888, Mr. Dibrell was appointed her administrator, and on January 10, 1889, he filed a bill in the nature of a bill of interpleader against the next of kin of K. J. Morris, and the next of kin of his widow, to settle the question as to which of them are entitled to the personal estate which the widow inherited from her husband.

The next of kin of the widow, who for brevity will be hereafter styled the "Stratton claimants," insist that they are entitled to said personal estate, under the general statute of distribution of the State contained in § 2429 of the Code of 1858.

The next of kin of K. J. Morris, who for brevity will be hereafter styled the "Morris claimants," insist that they are entitled to said estate under said Act of April 1, 1885, which is as follows:

"AN ACT to amend § 3278 of the Code of Tennessee by Milliken & Vertrees (§ 2429 of the Code).

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee, That § 3278 of the Code of Tennessee by Milliken & Vertrees be amended as follows: If the personal estate as to which any person dies intestate, and who was a lunatic or non compos mentis, was derived in whole or in part from an intestate husband or wife, then in that event so much of the personal estate as was derived and remains unexpended or in the possession of any guardian or custodian of the estate of said lunatic or non compos mentis, shall go to the next of kin of the person from whom it was so derived,*

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said next of kin to take in the order named in said section in the case of the personal estate of intestates.

"SEC. 2. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it."

"Passed April 1, 1885; approved April 6, 1885."

The Stratton claimants insist that said Act has no application to the estate of Mrs. Morris, because, as they say, she was not a "lunatic or *non compos mentis*," within the meaning of those terms as used in said Act; and they further insist that said Act is in violation of several provisions of the Constitution of the State of Tennessee.

We think that the Legislature used the words "lunatic or *non compos mentis*" in the Act to denote a person who has not sufficient mental capacity to make a will; and, therefore, the first question is, whether Mrs. Morris, at the time of her death, was possessed of "a sound and disposing mind and memory."

Since the passage of the Act of 1885 a bitter controversy has arisen between the Morris family and the Stratton family, and most of the witnesses belong to, or are allied with, one or the other of those families. The testimony of all such witnesses, taken since the passage of said Act, is subject to criticism, as being affected more or less by interest or prejudice. But the testimony taken upon the inquisition of lunacy in 1884, before said Act of

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the Legislature was passed, is subject to no such criticism. The inquisition was instituted and prosecuted by the Stratton family, and, though certain members of the Morris family were examined as witnesses before the jury, they were doubtless introduced by the petitioner, Madison Stratton, who was a brother of Mrs. Morris; and at the time they gave their testimony, they had no idea that they would ever be interested in the estate of Mrs. Morris.

At the inquisition Dr. Thomas L. Maddin testified that he had been her husband's family physician for twenty-five years. He says: "I think she is a person of unsound mind, to the degree that she is not capable of governing herself or her property. Her mind is impaired by this disease. At times she has lucid intervals, in this sense: She recognizes her friends, and sometimes speaks in monosyllables of three or four words. I do not think she could give directions about her estate. If asked to sell a piece of property she could not do so; she has not sufficient mind to make negotiations concerning property; she has not sufficient mind to govern herself or property; she has not sufficient capacity to care for herself or property, and has not had, for eighteen months or more, except for minor physical wants."

Dr. John H. Callender, Superintendent of the Tennessee Asylum for the Insane, testifies as follows: "Her physician and nurse described to me her disease and accompanying symptoms, and the

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nature of her attacks; my opinion from these, and my observation and diagnosis of her case, was that her insanity and imbecility was progressive in character, and that it would end in final dementia. At the time of my visits she was so unsound in mind as to be wholly incapacitated to govern herself in person or property."

All of the non-expert witnesses examined at the inquisition expressed the opinion that she was of unsound mind, and they stated the facts upon which their opinions were based.

It is true that after she was placed under guardianship there was a steady and marked improvement in her condition, both physical and mental, and it is barely possible that if she had lived a few years longer her mind might have been completely restored. But we do not think that her mental condition ever improved, in fact, sufficiently to have enabled her to make a valid will.

Mr. Dibrell, who was her guardian, and the husband of one of her nieces, testifies that she was not capable of managing her affairs, or of comprehending her property or her property rights; that he did not think she had the capacity to make a will; that she had no conception of her estate, and never asked about it, or how it was being used or disposed of; and that he did not think she could have been intrusted to buy a calico dress.

When Dr. Thomas L. Maddin was cross-exam-

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ined in this cause he was asked whether Mrs. Morris, to the close of her life, ever became mentally competent to buy and sell property, make a will, and transact business without the aid of a guardian. His answer was: "She was absolutely unable to do or say any thing, or to communicate her wishes; and therefore, as regards her mental state, it was impossible to know either its range of subjecting capacity or wish."

Dr. Callender, when examined in this cause, said: "At no period of my observation of her after Mr. Morris' death did I regard her as capable, mentally, of taking care of her person, or of managing her property or affairs, or of fully comprehending any but the simplest current events in her presence, and at all times not even them; and during all of the period of my visitation, though her physical health was sometimes quite improved, she was invalid in body as well as mentally incompetent personally for the performance of any civil act. I saw her the last time about two weeks before her death."

A significant circumstance connected with the question of mental capacity after the passage of the Act of 1885, is the fact that, though she lived more than three years after that Act was passed, neither she nor any of the Stratton claimants ever suggested the propriety of her making a will.

If she had made a valid will it would have at once taken the case out of the Act of 1885;

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and the fact that no one ever suggested the idea of her making a will is persuasive evidence that the Stratton claimants did not believe that she had the mental capacity to do so.

We agree with the Chancellor that Mrs. Morris was at the time of her death a lunatic, or person *non compos mentis*, within the purview and meaning of Chapter 88 of the Acts of Tennessee of 1885.

The second question is as to the constitutionality of said Act. It was said by Judge Green, in *Bank v. Cooper*, 2 Yer., 603, that "there are certain eternal principles of justice which no government has a right to disregard. It does not follow, therefore, because there may be no restriction in the Constitution prohibiting a particular Act of the Legislature, that such Act is therefore constitutional."

Mr. Justice Miller said that "it must be conceded that there are such rights in every free government beyond the control of the State." *Loan Association v. Topeka*, 20 Wall., 662.

And Judge Cooley says that "there was never a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition." Cooley's Con. Lim., pp. 37, 175.

The doctrine of this Court, however, is that "the legislative power of the General Assembly of this State extends to every subject, except in so

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far as it is prohibited either by the delegated powers of the Federal Government or by the restrictions of our own Constitution. He who would show the unconstitutionality of an Act of the Legislature must be able to put his finger upon the provision of the Constitution violated." *Demoville & Co. v. Davidson County*, 3 Pickle, 220; *Davis v. State*, 3 Lea, 377; *Luehrman v. Taxing District*, 2 Lea, 438; *Hope v. Deaderick*, 8 Hum., 8; *Bell v. Bank*, Peck, 269, 270. See also Cooley's Con. Lim., p. 173.

"A statute cannot be annulled upon supposed natural equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the Constitution beyond its plain and obvious import." *Davis v. State*, 3 Lea, 378.

"The Courts are not at liberty to declare an Act void because it is, in their opinion, opposed to a spirit supposed to pervade the Constitution, but not expressed in words." *Luehrman v. Taxing District*, 2 Lea, 438; Cooley's Con. Lim., p. 171.

But, "in considering State Constitutions, we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. A Constitution is not the beginning of a community nor the origin of private rights; it is not the foundation of law nor the incipient state of government; it is not

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the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made; it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought." Cooley's Con. Lim., pp. 36, 37.

"The right to private property is a sacred right. It was not introduced as the result of princes' edicts, concessions, and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm." Cooley's Con. Lim., p. 358.

"The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense from its feeble force in the savage state to its full vigor and maturity among polished nations forms a very instructive portion of the history of civil society. The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself." 2 Kent's Com., pp. 318, 320.

"The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants." 2 Kent's Com., 326; Cooley's Con. Lim. (4th Ed.), top page 493, note 1.

"The right to transmit property by descent to one's own offspring is dictated by the voice of nature. The universality of the sense of a rule or obligation is pretty good evidence that it has its foundation in natural law." 2 Kent's Com., p. 326.

"In the early periods of the English law a man was never permitted to totally disinherit his children, or leave his widow without provision. The Roman law would not allow a man to disinherit his own issue without some just cause assigned in his will. The reason of the rule in the civil law was that the children were considered as having a property in the effects of the father." 2 Kent's Com., p. 327.

One of the provisions of Magna Charta was "that the goods of every freeman should be disposed of according to his will, or, if he died intestate, that his heirs should succeed to them." Craik & Macfarlane's History of England (Vol. I.), 558; Blackstone's Com., Book 4, 424.

"In America the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance to our descendants in regular order and succession, is enjoyed to the fullness and perfection of absolute right." 2 Kent's Com., pp. 327, 328.

"In ancient times if a man died without making any disposition of his goods and chattels the king, as *parens patriæ*, seized them, but not for his own use. He seized them to the intent that

they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, then those of his blood." *Hughlett v. Hughlett*, 5 Hum., 464.

Having ascertained how the rights of property existed in this State when the Constitution was formed, and that one of the objects of the Constitution was to protect and preserve those rights, we will next proceed to examine whether the Act of 1885 violates any of the provisions of that Constitution.

It is insisted that it violates so much of Article I., Section 8, as provides that no man shall be deprived of his "property but by the judgment of his peers or the law of the land."

It is not contended that the Act of 1885 has deprived any one of the right of trial by jury, and therefore said Act cannot be shown to violate that provision of the Constitution, unless it can be established, first, that it has deprived some one of "property;" and, second, that it is not the "law of the land."

Any citizen may be deprived of his property by a statute, provided the statute is what is known as the "law of the land." It is when a statute is not the "law of the land" that a citizen cannot be deprived of his property under it.

The first inquiry, then, is as to whether any one has been deprived of *property* by the Act of 1885.

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It is insisted that the next of kin of Mrs. Morris were not deprived of any property, because the personal property which she inherited from her husband did not belong to them, and they, at most, had a mere expectancy in regard to it. The law upon this point is thus stated by Judge Cooley: "A right cannot be considered a vested right unless it is something more than such a mere expectancy as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property. And it is because the mere expectation of property in the future is not considered a vested right that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living, and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this provision is no more than a declaration of the Legislature as to its present view of public policy as regards the proper order of succession—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and, for reasons

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of general public policy, transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir to be protected by the Constitution.

“An anticipated interest in property cannot be said to be vested in any person, so long as the owner of the interest in possession *has full power, by virtue of his ownership, to cut off the expectant right by grant or devise.*” Cooley’s Con. Lim., pp. 359, 360.

It seems that under the civil law the children were considered “as having a property in the effects of the father,” because under that law “he could not disinherit his own issue without some just cause assigned in his will” (2 Kent’s Com., p. 237); while at common law the children were not considered as having a property in the effects of the father, because under that law he could disinherit his own issue without assigning any cause therefor in his will. But where the father becomes hopelessly insane before making his will, and so remains until his death, he practically has no more power to disinherit his children, under the common law, than he would have had under the civil law. And if children are considered as having a property in the effects of a sane father, under the civil law, it is difficult, at first blush, to see why the children of an insane father would not have a property in his effects under the

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common law. The reason, however, is that however hopeless the insanity may appear to be, there is always a possibility of recovery, and the ever-presence of that possibility prevents the expectations of the children from being recognized as vested rights of property.

We are therefore of opinion that the personal property which Mrs. Morris inherited from her husband was not the property of her next of kin, and therefore that they were not deprived of it by the Act of 1885.

It is next insisted that Mrs. Morris was not deprived of said property. It is conceded that it became her property at the death of her husband, and that it remained her property up to the time of her death.

It is said, however, that the Act of 1885 did not interfere in the least with her possession or enjoyment of the property during her life, and as her title and ownership was extinguished by her death, she could not have been deprived of it, by the Act of 1885, at any time.

The argument is that the death of the owner extinguished her title and ownership; that the dead can have no vested property rights; that the power of the State to take the property of decedents and dispose of it as it chooses is unqualified; and therefore that the State had the right to take the property, at the death of Mrs. Morris, and make "a gift" of it to persons who were strangers to her in blood.

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We cannot assent to this argument. Ordinarily no one can make a complete and valid "gift" of property unless he be the full legal and equitable owner thereof, and it is not shown when or how the State ever acquired any such ownership of the property here in controversy. Was it by gift, or purchase, or bequest from Mrs. Morris? If so, where is the evidence of any such change of title? Was it by escheat, or under the statute of distribution? If so, where is the statute under which the State derived its title, either by way of escheat or as distributee of Mrs. Morris?

The contention must necessarily be that the State, while having no beneficial ownership in the property, had an absolute power of disposition over it. But this power of disposition must have been conferred upon the State either by Mrs. Morris, who was the owner of the property, or by the Constitution, or by the common law. It is not pretended that Mrs. Morris ever invested the State, as trustee or otherwise, with any such power of disposition over her property. No provision can be found in the Constitution authorizing the State to make any disposition of the property of an intestate citizen who leaves next of kin capable of inheriting. The only remaining source of power must be the common law; and we do not understand that any such power was ever conferred by that law upon the king. On the contrary, so far from the king having the unqualified power to take and dispose of the property of intestates, the

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power, if it had ever been exercised, was, as we have shown above, surrendered by King John in Magna Charta; and at the time the Constitution of Tennessee was adopted the right of an intestate "to transmit his property by inheritance to his own descendants" was enjoyed, as Chancellor Kent says, "in the fullness and perfection of absolute right."

It is true that in ancient times the king, as *parens patriæ*, took into his possession the goods of intestates, but he took them not for his own use, and still less to make "a gift" of them to strangers. He took them, as said by this Court in the case above cited, "to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, then *those of his blood*." *Hughlett v. Hughlett*, 5 Hum., 464.

If the State had the right to take the property of Mrs. Morris and make "a gift" of it to strangers, the State had the right to keep it and appropriate it to her own use; but we suspect that no one will maintain, at this day, that the State has the right to confiscate the property of citizens who are guilty of no crime, whether such citizens be testate or intestate, sane or insane, living or dead.

It is certainly true "that the death of the owner extinguishes his title and ownership, and that the dead can have no vested property rights."

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The complaint in this case is, however, not that the State despoiled Mrs. Morris of any of her property after her death, but that during her life it deprived her of the right "to transmit her property by inheritance to her own descendants or next of kin."

The Court is of the opinion that such a right is "property;" that Mrs. Morris was deprived of that property by the Act of 1885, and therefore that said Act is unconstitutional unless it can be shown that it is "the law of the land."

The clause, "law of the land," was defined in our earlier cases to mean "a general and public law, equally binding upon every member of the community;" but by our later cases it is defined to mean a law "which embraces all persons who are or may come into like situation and circumstances." *Vanzant v. Waddell*, 2 Yer., 270, 271; *Wally v. Kennedy*, 2 Yer., 555; *Bank v. Cooper*, 2 Yer., 605; *Jones v. Perry*, 10 Yer., 71, 72; *Sheppard v. Johnson*, 2 Hum., 296; *Budd v. State*, 3 Hum., 491; *State v. Burnett*, 6 Heis., 189; *McKinney v. Hotel Company*, 12 Heis., 107; *Mayor v. Dearmon*, 2 Sneed, 122; *State v. Rauscher*, 1 Lea, 97; *Davis v. State*, 3 Lea, 379; *Maney v. State*, 6 Lea, 221; *Hatcher & Lea v. State*, 12 Lea, 370, 371; *Woodard v. Brien*, 14 Lea, 523.

Laws public in their character, and otherwise unobjectionable, may extend to all citizens, or be confined to particular classes. *Cooley's Con. Lim.*, p. 390.

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And it matters not how few the persons are who may be included in a class. If all who are, or may come, into the like situation and circumstances be embraced in the class, the law is general, and not partial. *Budd v. State*, 3 Hum., 492.

Citizens may be classified under Article I., Section 8, of the Constitution when the object of the Legislature is to subject them to the burden of certain disabilities, duties, or obligations not imposed upon the community at large. And citizens may be classified under Article XI., Section 8, of the Constitution when the object of the Legislature is to confer upon them certain rights, privileges, immunities, or exemptions not enjoyed by the community at large.

If the classification is made under Article I., Section 8, every one who is in, or may come into, the situation and circumstances which constitute the reasons for and the basis of the classification, must be subjected to the disabilities, duties, obligations, and burdens imposed by the statute, or it will be partial and void. And if the classification is made under Article XI., Section 8, every one who is in, or may come into, the situation and circumstances which constitute the reasons for and basis of the classification, must be entitled to the rights, privileges, immunities, and exemptions conferred by the statute, or it will be partial and void.

It follows that the cases which have been decided upon Section 8 of either of said articles are of equal value in arriving at the meaning of the

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expression "all who are, or may come into the like situation or circumstances," and counsel in argument have properly referred to cases decided upon each of said articles.

Before proceeding to examine those cases, it is proper to notice another limitation which is imposed upon the Legislature in making classifications of citizens. The limitation is stated by Judge Cooley as follows:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, would be sustained, notwithstanding its generality.

"Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the Act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would conflict. To forbid to a class the right to the acquisition or enjoyment of property in such a manner as should be permitted

to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who claim the right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where authority is negatived." Cooley's Con. Lim., pp. 390-393.

That statutory classifications should be "natural, and not arbitrary," was recognized by this Court in *Demoville v. Davidson County*, 3 Pickle, 218-223.

It is believed that an examination of the reported cases will show that none of the legislative classifications of citizens which have been sustained by this Court, were arbitrary in their character. It will also be seen that all of them were made for one or the other of the following purposes, viz.: (1) For the purpose of taxation, (2) for police purposes, (3) for the necessary protection of the particular class, (4) for the release of a class from some particular obligation or liability.

In the case of *State v. Schlier*, 3 Heis., 286, the classification was made for the purpose of taxation. The Legislature imposed a privilege tax upon photographers, which was graded according to the size of the town in which the privilege was exercised. There was nothing arbitrary in such a classification. On the contrary, it was natural and just that the classification should be based upon the idea that the profits of the business would be proportioned to the size of the town,

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and that the tax should be proportioned to the profits. Every member of the community was at liberty to engage in the business and to exercise his art either in a city, in a town, or in the country, as he might elect.

In the case of *Fulghum v. Mayor*, 8 Lea, 635, the classification was made for the purpose of taxation. A license tax was imposed for the privilege of keeping a hotel, but there was a proviso that hotels having less than ten rooms should pay no privilege tax. There was nothing arbitrary in such a classification. It was natural and right that the tax should be graded according to the earning capacity of the hotel, and every member of the community was at liberty to engage in the business, and to elect whether he would keep a hotel of ten rooms or less.

In the case of *Robbins v. Taxing District*, 13 Lea, 303, the classification was made for the purpose of taxation. A law provided that drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods by sample should pay a special privilege tax. The classification in that case was not arbitrary. Before the law was passed resident merchants were required to pay a regular occupation tax, while traveling salesmen or drummers paid no tax. It was natural that the law should remedy this inequality by requiring drummers to pay a privilege tax. Every member of the community was at liberty to engage in the

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mercantile business, and to elect whether he would be a resident merchant or a drummer.

In the case of *State v. Rauscher*, 1 Lea, 96, the classification was made for police purposes, as a regulation of the sale of intoxicating liquors. The sale of intoxicating liquors within four miles of an incorporated institution of learning was prohibited by a certain law, but there was a proviso in it that the law should not apply to the sale of such liquors within an incorporated town. The classification in that case was by no means arbitrary. It was supposed that the injurious consequences resulting from the sale of liquor near incorporated institutions of learning would be much reduced by restricting such sales to incorporated towns where adequate police force is usually maintained. It was therefore natural and right to restrict the sales to such towns. Every member of the community was at liberty to engage in the business, and to elect whether he would sell within an incorporated town or not; and every incorporated town was allowed the privilege of having such sales made within its limits.

Afterward the law was amended so as to divide the incorporated towns of the State into two classes, and to prohibit such sales in those towns which were organized under the Act of 1882, while the privilege of allowing such sales within their limits was continued to the other towns of the State. This classification was purely arbitrary. The efficacy of the police of a town was in no

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way dependent upon whether it was organized under the Act of 1882 or not; and, accordingly, this Court held that the attempted discrimination between the different towns of the State was unconstitutional and void. *Hatcher & Lea v. State*, 12 Lea, 370, 371.

In the case of *Theilan v. Porter*, 14 Lea, 627, the classification was made for police purposes, to abate nuisances. An Act authorized "the several communities embraced in the territorial limits of all such municipal corporations in the State as have had, or may have, their charters abolished," etc., to condemn and abate as nuisances all houses which should be found to be in an unsanitary condition.

The classification in that case was not arbitrary, but based upon the natural distinction between houses in a sanitary and houses in an unsanitary condition; and every community whose charter had been or might be abolished, was entitled to the benefit of the police power conferred by the Act.

In the case of *Parks v. Parks*, 12 Heis., 634, the classification was made for the necessary protection of a class known as cotton merchants, factors, and brokers, by giving them a lien for the purchase-money for cotton sold. The classification was by no means arbitrary. The business in which those persons were engaged had a special need for such a lien. Every citizen of the State could engage in the business, and thus become entitled to the benefits of the lien.

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The liens given to mechanics, landlords, carriers, and others, are all supported upon the same considerations. *Davis v. State*, 3 Lea, 380; *Demoville v. Davidson County*, 3 Pickle, 217.

In the case of *Davis v. State*, 3 Lea, 380, the classification was made for the necessary protection of witnesses from the rapacity of speculators, the speculation in witness' fees being deemed by the Legislature detrimental to the public service. Every citizen of the State who should become a witness would be entitled to the benefit of the protection afforded by the Act.

The Act did not deprive the witness of the power of free disposition of his fees as property, because the claim of a witness for fees, being only a chose in action, was not assignable at common law, and, as the Legislature first made such claims assignable, it was equally within its competency to take away that quality. Upon the same principle the Legislature may classify minors, married women, lunatics, and other persons under disability, and enact statutes "for their assistance, comfort, and support." Cooley's Con. Lim., pp. 389, 390, 391. But in this State, while it is recognized as the duty of the government "to protect and provide for those who are incapable of taking care of themselves, it is the duty of the Legislature to pass general laws whereby this may be done." *Jones v. Perry*, 10 Yer., 75. The fact that it is the duty of the State to "protect and provide for those who are incapable of taking care of themselves," proves

that the State cannot legislate to *deprive them of their property rights*.

In the case of *Demoville & Co. v. Davidson County*, 3 Pickle, 218, the classification was made for the purpose of releasing all druggists from liquor-dealer's privilege taxes incurred by them, where the liquors were sold in good faith, for medical uses only, and the druggists' license was not used by them as a blind to sell liquors as a beverage. It was held by this Court that the class of druggists thus described by the Act form "*a natural and not an arbitrary class*," and were properly distinguished in their treatment by the State from those who had been guilty of selling liquor under the guise of doing a regular druggist's business.

We will now refer to those cases where the Legislature has attempted to make certain classifications among citizens, which classifications this Court has held were *not* within the constitutional power of the Legislature to make.

In the case of *Morgan v. Reed*, 2 Head, 275, an Act of 1856 declared that the title of all persons to any slave sold under judicial proceedings under the Act of 1827, and to which the heirs distributees, etc., were not made parties, should be forever barred, unless suit should be brought within six months after the passage of the Act of 1856. It was held that the Act of 1856 was unconstitutional. The Act may, in fact, have embraced a large number of cases, in which very many persons

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may have been interested; in fact, it was sought to be justified as a "relief measure;" but there were no reasons why the statute of limitations should be reduced to six months, in order to meet the exigencies of those cases that were not equally applicable to all other cases, where void or irregular sales of slaves had been made.

In the case of *Memphis v. Fisher*, 9 Bax., 239, an Act provided that municipal corporations with a population of 35,000 or more might prosecute suits without giving bond for costs. It was held to be unconstitutional. For, though municipal corporations possess some powers pertaining to sovereignty, yet, when they become suitors, they stand as individuals; and there were no reasons why they should be exempted from giving bond for costs that would not be equally applicable to an individual.

In the case of *Brown v. Haywood*, 4 Heis., 360, an Act provided that in any county of the State where civil suits had been removed from the county in which they had been originally brought, they should be transferred back to the original county upon the affidavit of three unconditional Union men of the original county, that justice could be done all parties. The Act was held to be unconstitutional. There were no reasons why suits already transferred should be sent back, that were not equally applicable to suits that might afterward be transferred; and there were no reasons why the affidavits of Union men should

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have any more weight than the affidavits of other men.

In the case of *Wally v. Kennedy*, 2 Yer., 554, an Act provided that any suit brought in the name of an Indian reservee, to recover certain lands, should be dismissed if it were shown that it was being prosecuted for the benefit of any person other than the one in whose name suit was brought. The Act was held to be unconstitutional. There were no reasons why a suit prosecuted in the name of an Indian reservee, for the use of another, should be dismissed, that were not equally applicable to every case where the equitable owner of real estate sued in the name of the person holding the legal title.

In *Bank v. Cooper*, 2 Yer., 599, an Act of the Legislature undertook to deprive the debtors of the Bank of the State of Tennessee of the right of trial by jury and of the right of appeal. It was held to be unconstitutional. There were no reasons why the debtors of that bank should be deprived of their rights that were not equally applicable to all other debtors, where the debts arose from similar contracts.

In the case of *Budd v. State*, 3 Hum., 492, an Act created a new felony in relation to the officers, agents, and servants of the Union Bank. This Court held that it was unconstitutional. There were no reasons why the officers, agents, and servants of that bank should be subjected to the felony in question that were not equally applicable

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to the officers, agents, and servants of all other banks.

In the case of *McKinney v. Hotel Company*, 12 Heis., 104, an Act authorized a certain hotel company to contract to pay interest at the rate of ten per cent. per annum upon a loan of \$100,000. The Act was held to be unconstitutional. There were no reasons why that company should be allowed to contract to pay ten per cent. interest that were not equally applicable to all other companies or individuals who might wish to borrow money; and there were no reasons why those who loaned money to that company should be allowed to charge ten per cent. that were not equally applicable to all the money lenders of the State.

In *Daly v. State*, 13 Lea, 232, an Act, in effect, created, as a new privilege, the right to sell pools on horse-races, and to limit the exercise of the privilege to a certain class of private corporations. This Court held the Act to be unconstitutional. There were no reasons why those corporations should be allowed the privilege of selling pools that were not equally applicable to all other corporations or individuals in the State who might wish to exercise that privilege.

In *Burkholtz v. State*, 16 Lea, 72, 73, an Act made it lawful to sell pools under certain circumstances, but it contained a proviso that it should not apply to counties having a population of less than 75,000 inhabitants by the United States census last taken just preceding the date of the

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offense. Davidson and Shelby were the only counties in the State which had 75,000 inhabitants by the last United States census. It was held that the Act was unconstitutional. There were no reasons why pool-selling should be made unlawful in Davidson and Shelby Counties that were not equally applicable to all the other counties of the State.

In the case of *Woodard v. Brien*, 14 Lea, 522, 523, an Act declared that real estate should not be affected by the lien of a judgment until an abstract of the judgment was recorded in the Register's office, but it contained a proviso that it should apply only to counties that had, by the census of 1870, a population of not less than 40,000 inhabitants. Davidson and Shelby were the only counties in the State to which the Act could apply. It was held to be unconstitutional. There were no reasons why judgment liens should be recorded in those counties that were not equally applicable to all the other counties of the State.

In *Neeley v. State*, 4 Lea, 316, the charter of a railroad company exempted its directors from jury duty. The exemption was held to be unconstitutional. There were no reasons why the directors of that company should be exempted from jury duty that were not equally applicable to all the citizens of the State.

In *Green & Currey v. State*, 15 Lea, 708-710, an Act provided that fifteen per cent. of the voting population of a county might organize into

militia, and be exempt from jury duty. It was held that the exemption was unconstitutional. There were no reasons why those who organized as militia should be exempt from jury duty that were not equally applicable to all the other citizens of the State.

In *Radio v. State*, 2 Pickle, 272, an Act made it a misdemeanor for any one engaged in the business of a barber to keep open bath-rooms on Sunday. It was held that the Act was unconstitutional. There were no reasons why barbers should be prohibited from keeping bath-rooms open on Sunday that were not equally applicable to inn-keepers and all other persons who kept and used bath-rooms for profit.

We conclude, upon a review of the cases referred to above, that whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary.

If the classification is made under Article XI, Section 8, of the Constitution for the purpose of conferring upon a class the benefit of some special right, privilege, immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.

If the classification is made under Article I, Section 8, of the Constitution for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some

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good and valid reason why that particular class should alone be subjected to the burden.

Another essential to the validity of every legislative classification, whether it be made under Article XI., Section 8, or under Article I., Section 8, is that it must not violate any other provision of the Constitution, whether such provision be expressed or implied.

Article I., Section 30, of the Constitution expressly provides that no hereditary emoluments, privileges, or honors, shall be granted or conferred in this State, and therefore the Legislature cannot, under Article XI., Section 8, grant any *hereditary* privileges or honors upon a class, however meritorious or large the class may be.

Though the Constitution does not expressly prohibit the taking of private property for private use, yet it has been held to do so by implication. *Harding v. Goodlett*, 3 Yer., 52; *Clark v. White*, 2 Swan, 549; *Memphis Freight Co. v. Mayor, etc.*, 4 Cold., 425; and therefore the Legislature cannot, under Article I., Section 8, deprive one class of citizens of their property to "give" it to another, however small or odious the class may be from which the property is taken, or however large and meritorious the class may be to which it is given.

Under Article I., Section 8, an individual may be deprived of his property in many instances where the action of the Legislature would be clearly constitutional.

The property of an individual may be taken by

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summary proceedings for the payment of his taxes, or by judicial proceedings to compel the performance of his contracts, or to recover damages for the breach of his contracts, or for torts committed by him, or it may be taken as a punishment for his crimes. But the property of an individual cannot be taken under that section, or any other section of the Constitution, when it is taken from him *merely to "give" it to another.*

A law which violates any provision of the Constitution, whether the provision be expressed or implied, cannot be the "law of the land," because an unconstitutional law is, in fact, no law at all. Cooley's Con. Lim., p. 3.

The general statutes of descent and distribution of this State, as contained in the Code of 1858, §§ 2420-2430, classify the citizens of this State into those who die testate and those who die intestate. Any person who has capacity in the law to make a last will and testament can select the class to which he will belong. He may make his own will if he prefers to die testate, and if he prefers to die intestate he can adopt the disposition of his estate provided for in the statutes of descent and distribution. If he, from infancy, lunacy, or other disability, has not capacity in the law to make a will, he cannot select the class to which he will belong; he is forced into the class of intestates, and the disposition of his estate is necessarily controlled by the statutes of descent and distribution. Those statutes direct that the

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land of an intestate owner shall descend to *his* heirs, and that his personal property, after payment of debts, shall go to *his* next of kin. In no instance do they direct that any part of his estate shall go to those who are strangers in blood to him. They are in full accord with the principle announced by this Court, that it is the duty of the State, by general laws, "*to protect and provide for those who are incapable of taking care of themselves.*" *Jones v. Perry*, 10 Yer., 75.

They do not proceed upon the novel idea that the State has the right to seize upon the property of an intestate minor or lunatic, and appropriate it to the State's own use or "give" it away to strangers. On the contrary, they proceed upon the ancient doctrine that the king took the custody of intestate property "*not for his own use,*" but "*to the intent that it should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, then those of his blood.*" *Hughlett v. Hughlett*, 5 Hum., 464.

They fully recognize that "the right to transmit property by descent to *one's own offspring* is dictated by the voice of nature." 2 Kent's Com., p. 326.

In their main features those statutes have stood as the law of this State from the time of its admission into the Union down to the present time, and, though various changes have been made in them from time to time, the principle that a man's

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intestate property shall go to *his own* heirs or next of kin has been at all times recognized and preserved until the passage of the Act of April 1, 1885, which is the Act in controversy in this case.

The Act, in brief, provides that if the personal estate of an intestate *lunatic* was derived from an *intestate* husband or wife it shall go, not to the next of kin of the lunatic, but to the next of kin of the person from whom it was so derived.

It is said, though incorrectly, that the Act of 1885 was modeled upon paragraph 3 of § 2420 of the Code of 1858, which provides that where land came to the intestate by *gift, devise, or descent* from a parent, or the ancestor of a parent, and the intestate die *without issue*, if he have brothers or sisters of the paternal line of half-blood, and brothers and sisters of the maternal line also of the half-blood, then the land shall be inherited by such brothers and sisters on the part of the parent from whom the estate came, in the same manner as by brothers and sisters of the whole blood until the line of such parent is exhausted of the half-blood to the exclusion of the other line. If the intestate have no brothers or sisters, then it shall be inherited by the parent, if living, from whom or whose ancestors it came in preference to the other parent. If both parents be dead, then by the heirs of the parent from whom or whose ancestors it came.

It will be seen that paragraph 3 of § 2420 of

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the Code applies impartially to all intestates, while the Act of 1885 applies only to *lunatic* intestates.

It is said that the proportion of lunatics to sane persons is as but one to a thousand. One objection to special laws is that they single out one or a few odious or helpless individuals and undertake to regulate his or their rights by a rule different from that which is applicable to the community at large, and by which the great body of the people, or the legislators themselves, would not be willing to be bound. *Wally v. Kennedy*, 2 Yer., 557; Cooley's Con. Lim., p. 391.

There are no reasons why lunatics should be deprived of the right to transmit their property by inheritance to their heirs or next of kin that do not apply equally to persons who are sane.

Suppose Mrs. Gee, who was a sister of Mrs. Morris, had derived personal property from an intestate husband, then, upon her death, as she was sane, the property would go under the general law to *her* next of kin; but under the Act of 1885 the property which Mrs. Morris derived from *her* husband must go to those who are strangers in blood to her. Why should so important a distinction be made between two sisters? The only answer which we have heard is, that one of them was sane and the other insane.

It will be seen that paragraph 3 of §2420 of the Code applies impartially whether the property came to the intestate by *gift*, *devise*, or *descent*,

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while the Act of 1885 applies only to property which came from an *intestate* husband or wife.

There are no reasons why an intestate widow should be deprived of the right to transmit to her own next of kin property inherited by her from her husband that do not apply equally to property which she may have derived from him by gift or bequest.

If K. J. Morris had bequeathed the property in controversy to his widow, the Act of 1885 would not have applied, and the property would have gone to *her* next of kin under the general law. But instead of making a written will he seems to have preferred to die intestate, and thus adopt the will which the State suggested for him in its general statute of distribution; and yet, merely because he left the property to his wife in the one way rather than in the other, she is to be deprived of the right to transmit it to her own next of kin.

It will be seen that paragraph 3 of § 2420 of the Code does not apply except where the intestate dies without issue, and yet the Act of 1885 would have deprived Mrs. Morris of the right to transmit her own property to her own children. Her children by a marriage prior or subsequent to her marriage with K. J. Morris would have been disinherited, and even her children by *him* would have taken *her* property, not as *her* next of kin but as *his*.

It will be seen that while paragraph 3 of § 2420

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of the Code establishes a certain preference as between the heirs of an intestate, it does not direct that any part of his estate shall go to those who are strangers in blood to him; it does not deprive him of the right to transmit his own estate by inheritance to his own blood kin. But the Act of 1885 deprives a lunatic widow of all power to transmit to any of her blood kin any of the personal property which she may have derived from her intestate husband, and directs that the whole of it shall go to those who have not a drop of her blood in their veins.

The minute classification and sub-classification adopted by the Act of 1885, first forced Mrs. Morris into the class known as lunatics, where the majority against her at once became a thousand to one. It then forced her into a subclass composed of only those lunatics who had derived property from a husband or wife. It then forced her into a still smaller subclass comprising only those lunatics who had derived property from an *intestate* husband or wife.

The probability is that there are very few persons in the State who would answer the description of the subclass into which Mrs. Morris was finally forced by the Act of 1885. Assuming, however, that the Legislature has the power, in a proper case, to make its classification as minute as it sees proper, yet we hold that the classification must "be natural and not arbitrary."

We think that the classification made by the

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Act of 1885 is unnatural, arbitrary, and capricious, and for that reason we hold it to be unconstitutional. We are also of opinion that it deprived Mrs. Morris of the right to transmit her estate to her own next of kin; that such a right is "property;" that the Legislature undertook, in effect, to take her property away from her and "give" it to those who were strangers in blood to her; and as the Legislature cannot take private property for private use, the Act violates the Constitution, and for that reason it is not the "law of the land."

This conclusion renders it unnecessary to examine the constitutional questions as to whether the substance of the Act was sufficiently expressed in its title, or whether it sufficiently recites the law which it was intended to repeal or amend. This case, however, serves well to show that those requirements of the Constitution may have been intended to notify persons who may have an interest in opposing such legislation, as well as to inform the members of the Legislature of the true character of the legislation proposed to be enacted.

Upon the grounds above stated, we affirm the decree of the Chancellor. The costs of this Court will be paid by the appellants, the next of kin of K. J. Morris, deceased, and the costs of the Court below will be paid as adjudged by the Chancellor.

Judge Snodgrass dissents from the holding that the Legislature has not power to provide that estates of intestates shall go to others than those of their blood.

McCarthy v. State.

McCARTHY v. STATE.

(Nashville. January 20, 1891.)

1. CONTEMPT OF COURT. *Preventing attendance of witness.*

To prevent, or to attempt to prevent, the attendance upon a Court of this State of a legally summoned witness, by intimidation or other improper means, is such "unlawful interference with the process or proceedings of the Court" as constitutes a contempt, even when done by a person not a party to the cause in which the witness was required to attend.

Code construed: § 4881 (M. & V.); § 4106 (T. & S.).

2. SAME. *Same. Punishment here, though acts were done outside State.*

And Courts of this State have jurisdiction to punish such unlawful interference with their process, although the acts constituting the contempt were done outside the State for the purpose of inducing a non-resident witness to disobey a lawful summons to attend upon a Court in this State.

3. SAME. *Power of Criminal Courts to punish.*

Criminal Courts possess the same power as Circuit Courts to punish for contempt, and may therefore impose fine not exceeding ten dollars and imprisonment not exceeding six months, for such offense.

Code construed: § 4882 (M. & V.); § 4107 (T. & S.).

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. JOHN A. FITE, J., sitting by interchange.

McCarthy v. State.

QUARLES & TURLEY for McCarthy.

Attorney-general PICKLE for State.

TURNEY, Ch. J. Armlee and Depew were indicted for larceny and obtaining money under false pretenses. William Lodge, who lived in Alabama, was prosecutor. He had been summoned and also recognized to appear at the trial. McCarthy, with others, went to the home of Lodge and proposed to compromise the case, and told him if he came to Nashville he would get nothing; that it would not be safe for him to come—made him believe he would have no protection if he came—and paid the sixty dollars stolen.

The Judge of the Criminal Court, after arraignment, plea, and proof, fined McCarthy fifty dollars and imprisoned him ten days for contempt of Court. There is no error in this. It is a power inherent in all Courts of Record to enforce their orders, judgments, and decrees, and the execution of their process, as well as to prevent all interference with the carrying out of the same.

The prosecutor, Lodge, was so far within the jurisdiction of the Court as that forfeiture could have been taken against him for failing to appear. He was legally bound to appear and give evidence. McCarthy interfered, and, by exciting his fears, prevented him from doing so.

Section 4881 of the (M. & V.) Code is directly in point. It makes the "abuse of, or unlawful

interference with, the process or proceedings of the Court" a contempt of Court.

Section 4882—which provides: "The punishment for contempt may be by fine or imprisonment, or both; but, when not otherwise specially provided, the Chancery, Circuit, and Supreme Courts are limited to a fine of fifty dollars and not exceeding ten days' imprisonment, and other Courts are limited to a fine of ten dollars"—does not limit the Criminal Court to a mere fine of ten dollars. It was certainly the intention of the Legislature to include in the terms "Circuit, Chancery, and Supreme Courts" all Courts of Record exercising a general jurisdiction. The Judges of the Circuit, Criminal, and Chancery Courts are authorized to interchange ridings throughout the State, and thereby to exercise the jurisdiction conferred upon each. In several instances the Circuit and Criminal Courts are united, and in a very large majority of instances the Circuit Court has exclusive jurisdiction over criminal causes, there being but few exclusively Criminal Courts in the State.

When we consider the character of the Courts in the State, we conclude a Criminal Court is, to all intents, a Circuit Court, and we are not permitted to isolate the few strictly Criminal Courts, and declare they have less power to maintain their respectability, safety, and existence than have the many Circuit Courts clothed with a mixed civil and criminal jurisdiction. Criminal Courts were only established in the most densely populated

parts of the State, and for the relief of the Circuit Courts. Their establishment was a carrying off from one jurisdiction and a transfer to another. The transfer carried with it the jurisdiction attached at the time it was made.

If the rule contended for prevailed, it would create the awkward anomaly of a Judge having the power in one department of his duties to punish in one way for contempt, and in another department in a different and ineffective way. He might fine fifty dollars and imprison in civil causes for comparatively slight offenses, and fine only ten dollars for the most aggravated contempt in criminal cases.

The enforcement of the criminal laws is more important to society than that of the civil. The Legislature has always so regarded it, as is seen by reference to the statutes, and we may not infer it meant to cripple their administration.

In the case before us we have a Circuit Judge on interchange with a Judge of a Criminal Court.

If the offense had been committed in Judge Fite's circuit, there could be no question of his authority to inflict the punishment he has proposed to inflict in Nashville; or, if while Judge Ridley was on Judge Fite's circuit a like offense had occurred, there would be no doubt of his power to so punish.

We are unable to see why or by what process the interchange has lost jurisdiction to the one and conferred it upon the other.

Judgment affirmed.

TURNER v. STATE.

89	547
117	518

(Nashville. January 22, 1891.)

1. MURDER. *Second degree. Evidence sufficient.*

The facts set out in Court's opinion are held sufficient to support verdict for murder in second degree with sentence of fifteen years' imprisonment. (*Post*, pp. 550-555.)

2. CRIMINAL PRACTICE. *Appointment of Attorney-general pro tem.*

Appointment of Attorney-general *pro tem.*, by an order reciting that it was made "on account of the sickness" of the regular Attorney-general, is valid, and within the authority conferred by the constitutional provision empowering the Courts to make such appointment "in all cases where the Attorney for any district fails or refuses to attend and prosecute according to law." To state, in the order, a sufficient cause for the failure of the regular Attorney-general to attend, or for his failure to prosecute if present, is the same thing, in legal effect, as to state that he failed "to attend and prosecute." (*Post*, pp. 555-558.)

Constitution construed: Art. VI., Sec. 5.

Code cited: §§ 4733, 6083 (M. & V.); §§ 3962, 5242 (T. & S.).

Cases cited and approved: *Douglass v. State*, 6 Ver., 529; *Isham v. State*, 1 Sneed, 114.

Cited and distinguished or disapproved: *Hite v. State*, 9 Ver., 202; *Staggs v. State*, 3 Hum., 374; *Pippin v. State*, 2 Sneed, 45.

3. SAME. *Grand jury. Mode of selection.*

A Judge, who is directed and authorized by statute to appoint the grand jury of his Court, has performed that duty in a valid manner, where, instead of designating thirteen jurors in the first instance, he appointed and designated thirty-seven good and lawful men, from whom he selected a grand jury by lot in the usual way—the Judge afterward accepting and approving the thirteen jurors whose names were drawn. (*Post*, pp. 558, 559.)

Code construed: § 4253 (T. & S.).

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4. SAME. *Same. Same. Objection frivolous and comes too late after appeal.*

Moreover, objection to the method pursued by the Judge in impaneling the grand jury "savors too much of refinement, even for criminal proceedings," and comes too late, being made for the first time in this Court. (*Post*, p. 559.)

Cases cited and approved: *State v. Cole*, 9 Hum., 628; *McTigue v. State*, 4 Bax., 314; *Wallace v. State*, 2 Lea, 31; *State v. Dines*, 10 Hum., 512.

5. SAME. *Argument of counsel.*

It affords no cause for reversal that counsel for the State, in his argument in a murder case, referred in a general way to the Cincinnati riot as a historical fact. (*Post*, p. 565.)

6. SAME. *Remarks of by-stander in hearing of jury does not vitiate verdict.*

Court will not set aside verdict in a criminal case solely upon the ground that a by-stander made an improper remark in the presence of the jury during their consideration of the case. (*Post*, p. 564.)

7. EVIDENCE. *Defendant's statement made after the killing not admissible, when.*

Where it is entirely clear upon the proof that the deceased made no demonstration indicating that he had a weapon, or that he intended to draw one at the time he was fatally shot, it is not error to reject defendant's statement, made a few minutes after the difficulty had ended, to the officer arresting him, in which he said: "Hold on, those men [meaning deceased and his friend] are armed." This statement, if admitted, only proves defendant's belief that deceased was armed, which, in the absence of any demonstration, was wholly immaterial. (*Post*, p. 559.)

8. SAME. *Dying declaration. Mode of proving.*

Where dying declaration was committed to writing, and signed by the declarant at the time it was made, the writing, if in existence, is the primary evidence of such declaration, and must be produced. Parol evidence of such declaration is not admissible. (*Post*, pp. 559, 560.)

Case cited and approved: *Epperson v. State*, 5 Lea, 297.

Cited and distinguished: *Beets v. State*, Meigs, 109.

9. SAME. *Same. Verified by oath.*

Dying declarations, verified by the declarant's oath, are admissible in evidence. "The dying declaration has the sanction of an oath, and

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therefore the added oath can give it no additional verity. Two men swearing to a statement may strengthen it, but one man swearing to it a second time cannot." (*Post*, pp. 560, 561.)

10. EVIDENCE. *Admission of irrelevant not error, when.*

Admission, over defendant's objection, of irrelevant evidence is not reversible error, even in a criminal case, where the defendant's guilt satisfactorily appears from the other evidence, and the Court can clearly see that the evidence improperly admitted did not affect the result nor damage or prejudice the defendant. The rules of evidence are the same in criminal as in civil cases. (*Post*, pp. 561, 562.)

Code construed: § 6221 (M. & V.); § — (T. & S.).

Cases cited and approved: *Draper v. State*, 4 Bax., 254; *Wilson v. Smith*, 5 Yer., 381, 409; *Clark v. Rhodes*, 2 Heis., 206; *McAdams v. State*, 8 Lea, 463.

11. SAME. *Exhibition before jury of injured parts of deceased's body.*

On trials for homicide it is not error for the Court to permit portions of the body of the deceased to be exhibited before the jury for the purpose of explaining the nature, cause, extent, etc., of the wounds causing the death. (*Post*, pp. 564, 565.)

12. CHARGE OF COURT. *As to impeachment of defendant's veracity.*

The Court's omission to charge that evidence impeaching defendant's testimony in a criminal case should not weaken the presumption of his innocence, is not error where the Court had given, as an independent proposition, the usual charge as to the presumption of innocence indulged in favor of one accused of crime. (*Post*, p. 562.)

Case cited and distinguished: *Peck v. State*, 86 Tenn., 260.

13. SAME. *As to self-defense.*

In a case of homicide where the deceased, though insulted by defendant's language, neither inflicted nor offered to inflict violence upon him, there is no error in the Court's charge that "if the difficulty in which it is insisted that the deceased was killed, was brought about by the fault, design, or contrivance of the defendant, then the defendant cannot excuse himself as for a killing in self-defense, unless he, in good faith, used all means in his power to escape and abandon the difficulty before resorting to the fatal shot;" this language being qualified by the further statement that "no mere words, how oppro-

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brious soever they may be, will justify an assault." (*Post*, pp. 562-564.)

Cases cited and distinguished: *Smith v. State*, 8 Lea, 402; *Daniel v. State*, 10 Lea, 263; *Fisher v. State*, 10 Lea, 152.

FROM DAVIDSON.

Appeal in error from Criminal Court of Davidson County. G. S. RIDLEY, J.

MATT W. ALLEN and PITTS & MEEKS for Turner.

Attorney-general PICKLE and W. H. WASHINGTON for State.

DICKINSON, Sp. J. Turner was indicted for killing Thomas A. Holton, was convicted of murder in the second degree, and sentenced to fifteen years in the penitentiary.

The wound of which Holton died was inflicted by Turner May 15, 1889, in the office of Aris Brown, Justice of the Peace, in Nashville, while the Magistrate had under consideration the postponement of a case that had been called for trial. Besides Turner, Holton, and Brown, there were present in the room Holman, the attorney of Turner, Bland, a business partner of Holton, and Frasch.

Bell Reddick testifies that he was on the street

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just at the door, and saw all that occurred. When the altercation which preceded the shooting began, Turner was standing in front of the Magistrate, within a railing dividing the room. Holton and Bland were just outside of the railing next to the wall. At the opposite end of the railing from them, at the other wall, was a gateway admitting passage to the rear section of the room, where Turner was standing. A question arose as to continuing the cause, on the ground that the attorney of Holton and Bland was absent. Turner insisted on a trial. It had been postponed from an earlier hour in the morning at Turner's instance. Holton said that Turner's lawyer was not present at the hour fixed. Turner said he was. This affirmation and denial were repeated by them several times, and then Turner said: "You are a damned liar!" Holton then said: "You must take that back!" and moved along the railing in the direction of the gateway, which was five or six feet from where he was standing. Bland followed him. Holton made no threat other than the words quoted. Bland said nothing, and made no demonstration. When Holton reached the gateway Turner drew his pistol and fired, Holton turning his face from him as soon as he saw the pistol, thus exposing the rear of his right side. Turner fired quickly, and Holton fell with his head toward the street door. Holton was searched, and no weapon, not even a pocket-knife, was on him. He was in his shirt sleeves. When Turner fired, Holton

was from nine to eleven feet from him. The entrance and course of the ball showed that the back of Holton was exposed to the shot.

As to the foregoing facts there is no controversy. The conflict of evidence is upon the action and demonstrations by Holton in moving from his first position to the point where he was shot. Turner claimed that he believed, and had reason to believe, that it was necessary to shoot in self-defense. He testified as follows: "Then he started at me with his fist clinched, and said: 'You have got that to take back!' I said: 'I am not going to do it.' I just turned around right in my tracks and unbuttoned my vest facing him. When he got to the gate he put his right-hand back to his hip-pocket, and I pulled and fired as quick as that [illustrating]. He was very angry."

On cross-examination he said: "He turned when I shot." Defendant said that he was cool and not excited at the time. As stated previously, there were but five witnesses to the shooting besides the principals. On this point they testify, in substance, as follows:

Justice Brown said that Holton spoke quick, but not in a very angry manner; that he was very mild under the circumstances; that he did not start around in an angry manner, but moved off slowly; that he saw no demonstration by Holton, but did not see the position of his hands, as witness was looking at Turner.

Holman says that he saw Holton make no

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demonstration of any sort; that he did not attempt to draw a weapon as he walked down the railing; that he did not see Holton as distinctly as he saw Turner, and could not say whether Holton had his hands on his side or where, or what he was doing with them at the instant of firing, as he was then looking at Turner. Witness said to Turner as he was drawing his pistol, "Don't, Jim," but is not certain that Turner heard him.

Bell Reddick says that Holton, as Turner reached for his pistol, turned his body as if to escape the shot; that he made no demonstration to draw any weapon; that he had both hands held up in front of him as he walked down the railing.

Bland says that Holton walked down the railing holding his hands out in front of him; that Holton, about the time he turned around, called to Turner not to shoot.

Frasch, a witness for defendant, testifies that Holton, when he got in the gateway, started in a fighting position towards Turner, and that his right hand went down before he was shot. Cross-examined as to the exact time the hand went down, he makes it simultaneous with the fall of the body and the firing of the shot. He says: "I think he turned when he saw Mr. Turner was going to shoot, and the hand went down immediately."

Holton, in his dying declaration, says: "When I faced him, at the time I reached the opening, I

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saw him throw open his vest with his hand. I saw his pistol which he drew with his right-hand, and at that instant I threw my right side toward him and he fired immediately. At the time I was approaching him my hands were in front of me, or partially raised from my side, and in no angry manner." Thus it appears that defendant is entirely unsupported in his statement that the deceased made a movement as if to draw a weapon, and is flatly contradicted by Holton, Reddick, and Bland. Besides, every other witness but Frasch testifies that Holton, in moving toward the gate, was not angry, not threatening in manner. Two physicians who made a post mortem examination testified that the arm was not wounded, and that it would have necessarily been penetrated had it been put in any natural position for the purpose of reaching the hip or side pocket. The proof further showed that Turner bore Holton ill-will on account of what he considered a previous wrong. The plea of self-defense has nothing to support it.

Several alleged errors are relied on for reversal, and have been urged with so much earnestness and ability that they will be considered in detail.

First.—It is insisted that the indictment is a nullity, because it is signed by an Attorney-general *pro tem.* whose appointment was void. Under Subsection 8 of § 6083 of the Code, if the record failed to show the appointment of the Attorney-general *pro tem.*, after plea of not guilty and con-

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viction, defendant could not avail himself of any error in the appointment. In this case the record sets out the appointment as follows: "On account of the sickness of Attorney-general M. R. Priest, the Court appoints W. M. Hart Attorney-general *pro tem.*, said Hart being duly sworn as the law directs."

Article VI., Section 5, of the Constitution provides that the Court may appoint an attorney *pro tem.* "in all cases where the attorney for any district fails or refuses to attend and prosecute according to law." Section 4733 of the Code undertakes to amplify this, but this does not affect this case. It is claimed that, inasmuch as the order is before this Court, and specifies the sickness of the Attorney-general, and not his failure or refusal to attend and prosecute as the ground of action, the appointment is void. This of course excludes all presumptions that the Judge knew and performed his duty, and that the order stated merely the reason why the Attorney-general was not present, or, if present, why he failed to prosecute. The contention of counsel is that the order (if it undertakes to set forth any reason) must show that the Attorney-general failed to attend and prosecute, and that, so far as is shown by this order, he may have been present though sick, and, if present at all, the Court could make no valid appointment.

In *Hite v. State*, 9 Yer., 202, it was held that "before the Court can appoint an Attorney-general *pro tem.*, the record must show that the officer appointed by the State is absent."

In *Staggs v. The State*, 3 Hum., 374, the Court says: "When, therefore, we see the name of another person than the regularly appointed Attorney-general' to a bill of indictment, we must see from the record his appointment and the facts that authorized it."

Doubtless to meet these and like technical decisions, and to prevent criminals who go to trial without raising such points, and are fairly convicted on the evidence, from escaping through mere irregularities in the record which do not prejudice their rights, the Act of 1852 (§ 6083 of the Code) was passed.

In *Pippin v. State*, 2 Sneed, 45, upon an order reciting the incompetency of the Attorney-general, by reason of having been employed before his election to defend Pippin, as the ground for appointment, the indictment signed by such appointee was held void, the Court saying "the facts must appear on the existence of which the validity of the appointment depends," and that it did not appear that the Attorney-general refused to prosecute or take any action in the case, and therefore the Court, in declaring him incompetent and making the appointment on that ground, made "a new cause not stated in the Constitution." It would seem that this Court might have presumed that the Attorney-general had declined to act for the reason stated, and that the appointment was properly made, and that the order, in stating the reason that prompted the Attorney-general, by im-

plication stated his action. Some facts are of themselves so pregnant that other facts which are their legitimate offspring are included in their statement, and it would seem that the statement that an Attorney-general had been previously employed to defend a prisoner, followed by the Court appointing an Attorney-general *pro tem.* for that reason, necessarily implied that he had declined to prosecute, that being the course he would be expected to pursue.

In *Douglass v. State*, 6 Yer., 529, the order recited no cause for the appointment, and the indictment was sustained, Judge Catron saying: "The Court could not else than know that the Attorney-general was absent, and it was its duty to appoint a deputy for the time being."

In *Isham v. State*, 1 Sneed, 114, Judge Caruthers said: "It must be presumed that the Court would not permit any one to enter upon and discharge the important functions of this officer without the existence of some necessity and a regular appointment. The day has now passed for rescuing the guilty upon mere technicalities."

When the Court has jurisdiction "we are bound to presume they acted correctly, and that the proceedings are according to law unless the contrary appears." Martin & Yerger, 176.

The Constitution says the Attorney-general must "attend and prosecute." Therefore, though he attend, yet should he fail to prosecute, whether from sickness or any other cause, the Court may ap-

point. It is absurd to suppose that the Judge would have made the appointment if the regular Attorney-general were in attendance and ready to prosecute. The appointment was made on account of his sickness, which is equivalent to saying (presuming as we do that the Judge knew and did his duty) that sickness had either prevented him from attending or from prosecuting; and it makes no difference which was meant, as he could appoint in either contingency.

Second.—The Judge selected the *venire*, and the grand jury was drawn from it as provided in § 4791 of the Code. It is insisted that he should, in accordance with § 4253 (old Code), have appointed the grand jurymen. The object is to have the Judge himself select “good and lawful men.” If he “duly appoint and designate” each and every one of thirty-seven “good and lawful men,” as the record shows he did, then the thirteen drawn by lot have all and singular been appointed by him, and, after such selection, their acceptance by him is a sufficient approbation, and meets all the purposes of the statute.

The objection, in the language of Judge Turley in *State v. Cole*, 9 Hum., 628, “savors too much of refinement, even for criminal proceedings.” Besides, it comes too late, the defendant making it for the first time in this Court. The law is correctly stated as follows: “The defendant pleaded not guilty to the bill of indictment, and went to trial and was convicted; after this he shall not

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be permitted to object to the *venire*, or to the jurors summoned under it. If he have legal objection to the one or the other, he must avail himself of it, either by motion or plea, before he puts himself upon his country for his deliverance by his plea of not guilty. It is afterward too late." *State v. Cole*, 9 Hum., 628; *McTigue v. State*, 4 Bax., 314; *Wallace v. State*, 2 Lea, 31; *State v. Dines*, 10 Hum., 512.

Third.—Defendant offered to prove by the officer who arrested him a few moments after the shooting that defendant said to him: "Hold on, those men are armed." The Judge did not permit witness to answer, and error is assigned. At that time, although but a few moments had elapsed after the shooting, the affair was ended. Holton was prostrate, and Bland was down by his side. It could, if admissible, tend to show nothing but the belief, on the part of defendant, that when he fired these men were armed. That question is wholly immaterial in the light of the overwhelming proof that neither of them made any demonstration such as would indicate their having any weapon, or a purpose to draw a weapon.

Fourth.—The dying declaration was written out and was signed and sworn to by Holton. It is excepted to on the ground that witnesses who heard it should have testified to the declaration, using the writing, if necessary, only to refresh the memory, the writing not being itself admissible. It

is also objected to because it is sworn to, it being said that the oath adds "additional verity not provided for by law," and that it is, in effect, also a deposition, which cannot be introduced against a defendant in a criminal case.

In *Beets v. State*, Meigs, 109, the witness did not state whether or not he recollected the declaration, but a copy of a statement taken by him was admitted in evidence, and this was error.

Greenleaf says that if the declaration be committed to writing, and signed at the time it was made, the writing must be produced. If it be a deposition, and made *in extremis*, it may be admitted as a dying declaration. Greenleaf on Ev., Sec. 161. To same effect see Wharton on, Crim. Ev., Sec. 295.

This rule is cited as the law in *Epperson v. The State*, 5 Lea, 297. The entire current of authority in England and in this country is to the same effect. The authorities are collected in *State v. Kindle*, 24 N. E. Rep., 485; 31 Central Law Journal, 142.

Truth is the object of every investigation in criminal as well as civil causes. The dying statement being evidence, should be reproduced with the utmost fidelity possible. It is an universal rule that an original writing is always the best evidence. There is no reason why an exception should be made in a criminal case, and that the uncertain report of words from memory should be substituted for the absolutely correct record in

writing. The dying declaration has the sanction of an oath, and therefore the added oath can give it no additional verity. Two men swearing to a statement may strengthen it, but one man swearing to it a second time cannot.

Fifth.—Holton in his declaration says that his intention was to reason with Turner to get him to correct his statement. It is objected that the admission of this statement of the intention he had in approaching Turner is reversible error.

The rules of evidence are the same in criminal and civil cases. Code, § 6221.

“If the evidence, although not strictly admissible, is not of a character to damage the defendant, or, as it has been otherwise expressed, if the Court can clearly see that the error has not influenced the result, it is no ground for a new trial.” *Draper v. State*, 4 Bax., 254; *Wilson v. Smith*, 5 Yer., 381, 409; *Clark v. Rhodes*, 2 Heis., 206; *Patterson v. Head*, 1 Lea, 664; *McAdams v. State*, 8 Lea, 463.

“And ordinarily, when a prisoner’s guilt is made out clearly by positive testimony, it should be no ground for a new trial in this Court that evidence was introduced which was not strictly admissible, if the Court can see that the defendant was not prejudiced thereby.” *McAdams v. State*, 8 Lea, 464.

The testimony was irrelevant, and should have been excluded, for it could have no bearing upon the issue, which was whether Turner, from what occurred, had reasonable grounds for believing

that it was necessary to kill in self-defense. The verdict is amply sustained by competent evidence, independent of this testimony, and the result could not, on any reasonable hypothesis, have been influenced by it; for his intentions might have been ever so fair, yet, if his acts were hostile, Turner would have been justified in shaping his conduct by them alone.

Sixth.—Turner, in his testimony, said, in effect, that he did not know the deceased, and witnesses were introduced to disprove this statement. It is insisted that the Judge should have charged the jury that this impeachment of Turner should not be permitted to weaken the presumption of innocence in his favor. In the light of all this evidence he instructed the jury that they must presume the innocence of the defendant, and this was unqualified. It was not his duty to charge the manifest truth that this impeachment of veracity had no connection with the presumption of innocence of a charge of murder. It would affect the credibility of his testimony only.

In *Peck v. State*, 2 Pickle, 260, cited for defendant, the only point decided by the Court was that the general character of a defendant, testifying for himself, could be impeached.

Seventh.—The Court charged: "In the present case, if the difficulty in which it is insisted that the deceased was killed, was brought about by the fault, design, or contrivance of the defendant, Turner, then the defendant cannot excuse himself as

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for a killing in self-defense, unless he, in good faith, used all means in his power to escape and abandon the difficulty before resorting to the alleged fatal shot." It is insisted that this makes the case "turn on the fact that Turner called Holton a damned liar, and immediately after this Holton and Bland made an assault upon Turner;" and that Turner is deprived of the justification of self-defense, because the Court instructs that after the difficulty was thus brought on by him he should have tried to escape and abandon the fight before shooting. The Court did not assume in his charge the fact that Holton and Bland made an assault, or that either of them engaged in a difficulty, and the proof is that they did neither.

In *Smith v. State*, 8 Lea, 402, the erroneous charge was, in substance, that the defendant, although first assailed and struck, is guilty, if he willingly engaged in the fight. To the same effect was the charge in *Daniel v. State*, 10 Lea, 263. These cases, and *Fisher v. State*, 10 Lea, 152, are relied on for defendant to sustain this exception. In each of those cases the fighting was mutual. Holton made no assault whatever. The charge excepted to is substantially like that in the Fisher case, which was sustained. There, as here, it was "argued that this means if the defendant may use insulting or provoking language, and, in consequence, the deceased attacked him, the defendant could not fight in self-defense."

Judge McFarland said: "That this is not the

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meaning of the charge is shown from other portions of it, in which his Honor instructs the jury that mere words, however insulting, do not justify an assault." In the present charge the Court said: "No mere words, how opprobrious soever they may be, will justify an assault." The jury, therefore, must, taking the whole charge, have understood that Holton, and not Turner, would have been the person in fault if Holton had assaulted Turner.

Eighth.—On a motion for a new trial it was alleged that one of the attorneys for the State, in his argument, alluded to a rumor that a juryman had gone on the jury to hang it, and that he mentioned a juryman's name so as to connect him with the charge. If this had occurred, the trial Judge would have been grossly derelict in duty not to have severely rebuked it, and, for such misconduct in argument, the verdict should not be permitted to stand. The evidence in this case does not sustain the charge. From what the record shows to have been said, the assignment entirely fails. The juryman testifies further that, as the jury passed by, some one said: "There is the juryman Mr. Sloan picked out to hang the jury." If the fact that a by-stander made a remark, however opprobrious, within the hearing of a jury were made a ground for setting aside a verdict, then trials would have no stability. It might be different, taken in connection with the main charge, had it been sustained.

Ninth.—A section of Holton's ribs and vertebra

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was given in evidence; and this is excepted to, on the ground that it was calculated to inspire the jury with such horror as to influence their verdict. It was introduced for the purpose of showing the direction and lodgment of the ball, and was clearly admissible.

Tenth.—It is insisted that one of the attorneys for the State used improper argument in referring to the Cincinnati riot. The bill of exceptions shows that it was done only in a general way as a historic fact, without any application being made to the case at bar.

The facts fully sustain the verdict, and there is no reversible error in the record. The judgment is affirmed.

Tuck v. Chaffin.

TUCK v. CHAFFIN.

(Nashville. January 24, 1891.)

1. CIRCUIT COURT. *Jurisdiction to condemn land levied upon by Magistrate's execution. Original and unlimited in amount.*

The jurisdiction of Circuit Courts to condemn lands to sale which have been levied upon by virtue of an execution properly issued upon a judgment of a Justice of the Peace, is not appellate, but original, and therefore not subject to the limitation as to amount placed upon the jurisdiction of Justices of the Peace.

Code construed: §§3793-3796 (M. & V.); §§3080-3083 (T. & S.).

Cases cited and approved: Dixon v. Caruthers, 9 Yer., 30; Gray v. Jones, 1 Head, 544; Houser v. McKennon, 1 Bax., 288; Jacobs v. Parker, 7 Bax., 434; Harris v. Hadden, 7 Lea, 216.

2. SAME. *Same. Several executions in favor of same person levied at same time and upon same land.*

And under the statute providing that "where several executions in favor of the same plaintiff are returned at the same term of the Court, levied on the same tract of land, they shall all be included in one judgment of condemnation, and only one order of sale [shall] issue," it is not material that the aggregate amount of all the judgments exceeds \$1,000—the maximum amount of the jurisdiction of Justices of the Peace.

Code construed: §3796 (M. & V.); §3083 (T. & S.).

FROM MACON.

Appeal from Chancery Court of Macon County.
C. MARCHBANKS, Sp. Ch.

Tuck v. Chaffin.

J. S. McMURRY and M. N. ALEXANDER for Tuck.

I. L. ROARK and HEAD & WOOTEN for Chaffin.

CALDWELL, J. This is an ejectment bill. In 1876 complainant sold and conveyed to defendant nine hundred acres of lands for \$1,000, and took his five promissory notes, for \$200 each, for the purchase-money. These notes matured respectively on the first day of May, 1877, 1878, 1879, 1880, and 1881. None of them were paid. On June 15, 1881, Tuck recovered judgment against Chaffin before a Justice of the Peace, in one suit on three of these notes, for the aggregate sum of \$640.50, and in another suit, on the other two notes, for the aggregate sum of \$424.19. Two months later, on August 15, 1881, executions were issued on each of these judgments, and placed in the hands of the Sheriff, who, on the same day, levied them on the said 900 acres of land. Thereafter the Justice of the Peace transmitted the papers in both cases, at the same time, to the Circuit Court, where the land was condemned for sale, *in one order*, to satisfy the two judgments. In due season, *one venditioni exponas* was issued to the Sheriff, commanding him to expose the land to sale for the satisfaction of both judgments. The sale was regularly made. Tuck became the purchaser for the full amount of his two judgments, and received a deed, with proper recitals, from the Sheriff.

In January, 1883, Tuck brought this bill against

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Chaffin to recover the possession of the land. Several matters of defense were interposed by the defendant, but the Chancellor, who heard the cause on pleadings and proof, was of opinion that complainant was entitled to the relief sought, and pronounced a decree accordingly. The defendant has appealed, and assigned errors.

The principal defense set up in the answer below, and urged in the assignment of errors here, is based upon the conceded fact that the Circuit Court pronounced but one judgment of condemnation, and awarded but one *venditioni exponas* for the satisfaction of the two judgments, which aggregated \$1,064.69. The proposition is that the action of the Circuit Court was null and void for want of jurisdiction of the amount (\$1,064.69) covered by the judgment of condemnation; that, because the *maximum* jurisdiction of a Justice of the Peace in an action on notes of hand is \$1,000, the Circuit Court, in condemning land for the satisfaction of judgments on such notes, can have jurisdiction of no greater amount.

It is not to be controverted that, as to amount, the jurisdiction of the Circuit Court, in matters of appeal and *certiorari*, is limited to that of the Justice of the Peace before whom the action originated (9 Yer., 30; 1 Head, 544; 1 Bax., 288; 7 Bax., 434; 7 Lea, 216), except in the case of interest accruing after the judgment of the Justice (7 Heis., 373); but that rule has no application to the present case.

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In the condemnation of the land the Circuit Court was not required to do what the Justice of the Peace should have done, as in case of appeal or *certiorari*; its jurisdiction was not appellate, but original. Code, §§ 3080 to 3083, inclusive.

The jurisdiction of the Circuit Court in condemning land properly levied on is unlimited. Section 3083 of the Code provides that, "where several executions in favor of the same plaintiff are returned at the same term of the Court, levied on the same tract of land, they shall all be included in one judgment of condemnation, and only one order of sale [shall] issue." The action of the Circuit Court in the case before us was in conformity with this provision. The two executions, included in the one judgment of condemnation, and for the satisfaction of which a single order of sale was issued, were in favor of the same plaintiff, levied on the same tract of land, and returned to the same term of the Court. That the aggregate of the two executions was more than \$1,000 is wholly immaterial.

The other assignments of error need not be mentioned in detail. Like the one just considered, none of them are well taken.

Let the decree be affirmed. The defendant will pay all costs.

White v. Bates.

WHITE v. BATES.

(Nashville. January 27, 1891.)

1. REDEMPTION OF LAND. *Sale for alimony.*

Lands are not sold for *debt*, and therefore the sale is not subject to any right of the owner to redeem, when made in a divorce case for the purpose of providing alimony for the wife, under a decree which awards no specific sum to the wife, but directs certain of the husband's lands to be sold, and one-half their proceeds to be paid to the wife as alimony, and the other half, less costs, to the husband.

Code construed: § 2947 (M. & V.); § 2124 (T. & S.).

2. SAME. *Same.*

And it is not necessary, in order to cut off the husband's supposed right of redemption in such case, that the bill should pray for, and the decree direct, a sale in bar of that right.

3. CHANCERY SALE. *For alimony. Validity of, on collateral attack.*

And such sale is valid on collateral attack, although the entire interest in the lands was decreed to be sold, when only half the proceeds were given to wife as alimony.

4. ALIMONY. *How decreed. When a debt.*

In decreeing alimony to the wife, the Court may, in its discretion, give her specific property, real or personal, belonging to the husband, or may assign to her a fixed proportion of his estate in kind or value, or may adjudge to her a specific sum to be paid by the husband; and it is only in the latter instance that alimony becomes a *debt* within the meaning of our redemption laws.

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Code construed: §§ 3325-3327 (M. & V.); §§ 2468-2470 (T. & S.).

Cases cited and approved: McGhee v. McGhee, 2 Sneed, 221; Boggers v. Boggers, 6 Bax., 299.

FROM JACKSON.

Appeal from Chancery Court of Jackson County.
H. H. DILLARD, Sp. Ch.

M. G. BUTLER for White.

McCORMY & BOND, COX & ANDERSON, GEORGE H. MORGAN, and HAMILTON PARKS for Bates.

LURTON, J. Complainant White, as assignee of Jos. Elrod, claims to have redeemed the land described in the pleadings, and files this bill to recover possession, rents, etc. The principal question to be decided is as to whether the land was, under the Code, subject to redemption.

The wife of Jos. Elrod, under whom White claims, filed her bill for divorce and alimony in the Circuit Court of Smith County. An absolute divorce was granted and alimony decreed. For the purpose of providing alimony, it was decreed that the undivided interest of Elrod in a tract of land in Jackson County be sold by the Clerk of that Court, for cash, to the highest bidder, after

due advertisement; that one-half of the proceeds be paid over as alimony to the wife, and that, after paying costs, the other half of proceeds be paid to Elrod himself. At this sale the defendant, Bates, became the purchaser. The sale was duly confirmed, and title vested in the purchaser.

None of the pleadings or decrees contain any thing concerning the right of redemption. Within two years after sale the complainant, as assignee of Elrod, undertook to redeem from Bates and his assignees by paying into the office of the Clerk of the Court making the sale the full amount of the purchase-money paid in by Bates, with interest. The purchaser and his assigns refused to permit redemption, and have refused to receive the redemption-money so tendered, and now insist that the land was not sold subject to redemption.

We are of opinion that this sale was free from any right of redemption. The claim for alimony in a wife's bill is not a debt. The creditors of the husband cannot be affected by the wife's claim for alimony. 2 Sneed, 221. Alimony is an allowance out of the estate of the husband made *pendente lite* for the maintenance of the wife, or for the sustenance of the wife after legal separation or a divorce. Such a claim is not a debt. Am. and Eng. Ency. of L., Vol. I., p. 482, and cases cited.

It may become a debt by judgment or decree for a specific sum to be paid by the husband;

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but the Court may, in its discretion, give alimony in property, real or personal, belonging to the husband, or may assign to her a fixed proportion of his estate in kind or value, or it may adjudge a specific sum to be paid. Code, §§ 2468-2470 inclusive; 6 Bax., 299.

Here the Court, instead of adjudging a particular sum to be paid the wife, or assigning to her a portion of his estate, decreed to her the one-half of the proceeds of the sale of a particular interest in land; the other half was decreed to the husband less the cost. Whether this was a wise decree, or sufficiently protected the husband's rights, in converting into money more of his land than was necessary to satisfy the wife's claim, it is unnecessary to determine. The husband submitted to the decree without appeal. The alimony was to consist of one-half the gross proceeds of the sale of this land. To say now that such a sale was subject to redemption, would be to cut down the allowance of the wife by the value of the equity of redemption. She would not get one-half the proceeds of the sale of this land, but one-half less the value of the right of redemption. The decree was not for a specific sum to be raised by a sale, but was for an indefinite sum, to be ascertained only by a division of the proceeds of the sale decreed. The sale was not, therefore, made to satisfy a debt. The decree was satisfied whatever the price the land might bring. Lands are only subject to redemption, under our statute,

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when sold for *debt*. The language of the Code is: "Real estate sold for debt shall be redeemable at any time within two years." § 2124. The subsections under the general provision cited all presuppose the condition that the sale is for *debt*. Such a sale as that ordered in this case was no more a sale for debt than one ordered for purposes of division.

The decree dismissing the bill will be affirmed with costs.

Eller v. Richardson.

89	575
110	128

ELLER v. RICHARDSON.

(Nashville. January 29, 1891.)

1. ABATEMENT, PLEA IN. *Waiver of.*

Plea in abatement averring want of jurisdiction of defendant's person is waived when, being properly filed before the Magistrate, it is not called to the attention of the Circuit Court after appeal before the trial on the merits had been commenced in that Court.

2. DEPOSITIONS. *Amendment of defective caption and certificate.*

After exceptions to depositions on account of defective caption and certificate had been sustained by the Clerk, and appeal taken from his action, the Court, on motion of one party and over the objection of the other, permitted the Commissioner who had taken the depositions to come into Court and amend the caption and certificate so as to conform to the facts, by the insertion of material statements that had been omitted.

Held: This was "sound and correct practice."

Cases cited and approved: *Bewley v. Ottinger*, 1 Heis., 355; *Carter v. Ewing*, 1 Tenn. Ch., 214.

3. SAME. *Same. By Justice of the Peace outside his county.*

And such amendment may be made by a Justice of the Peace in a county other than that of his residence. It involves the exercise of no judicial function, but the performance of a ministerial act—the correction of a mere clerical omission.

4. ADMINISTRATOR. *Proof of his appointment.*

Where in a suit prosecuted by an administrator his appointment is denied by plea, the production of his letters makes a *prima facie* case in his favor, and is sufficient proof on his part in the absence of any countervailing evidence.

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5. SAME. *Appointment of cannot be collaterally attacked, when.*

Appointment of administrator cannot be attacked collaterally upon the ground that it was made by the County Court of a county other than that in which the deceased resided at the time of his death. With respect to the grant of letters of administration County Courts are Courts of superior and general jurisdiction, and their judgments are conclusively presumed to import absolute verity when called in question collaterally.

Cases cited and approved: *Railway Co. v. Mahoney*, ante, 311; *Brien v. Hart*, 6 Hum., 132; *Johnson v. Gaines*, 1 Cold., 289; *Townsend v. Townsend*, 4 Cold., 79; *Williams ex parte*, 1 Lea, 530; *Carr v. Lowe*, 7 Heis., 93; *Varnell v. Loague*, 9 Lea, 158; *Posey v. Eaton*, 9 Lea, 504.

Cited and criticised: *Wilson v. Frazier*, 2 Hum., 31, 32.

Cited and distinguished: *D'Arusment v. Jones*, 4 Lea, 251.

6. SAME. *Same. Example of collateral attack.*

The attack upon an administrator's appointment is collateral, when it is made by plea, in a suit prosecuted by him, averring that his letters were issued by the County Court of a county other than that in which the deceased had his residence. Such plea is bad on demurrer.

7. SUPREME COURT PRACTICE. *Weight of finding of lower Court.*

In this Court the finding of the trial Judge upon the facts, where jury is waived, has the same weight as the verdict of a jury, and will not be reversed if there is *any material evidence* to support it.

Cases cited and approved: *Folwell v. Laird*, 12 Heis., 464; *Mabry v. Memphis*, 12 Heis., 539; *Ins. Co. v. Hughes*, 10 Lea, 462; *Stanley v. Donoho*, 16 Lea, 492; *Smith v. Hubbard*, 85 Tenn., 306.

 FROM TROUSDALE.

Appeal in error from Circuit Court of Trousdale County. E. L. GARDENHIRE, Sp. J.

Eller v. Richardson.

JOHN S. McMURRY for Eller.

SWOPE & TURNER for Richardson.

CALDWELL, J. This is an action of debt before a Justice of the Peace of Trousdale County against a citizen of Macon County, on whom the warrant was served while temporarily in the former county. Judgment for plaintiff, and appeal to Circuit Court. Trial by Circuit Judge without a jury, and judgment again for plaintiff. Appeal in error, and assignment of errors by defendant below.

First.—The plea to the jurisdiction of the person, filed by the defendant before the Justice of the Peace, was waived by the failure of the defendant to bring it to the attention of the Circuit Judge until after the commencement of the trial and the introduction of all the plaintiff's proof and a part of the defendant's proof.

It was properly stricken out in the Court below, and cannot be relied on here for the reason just stated.

Second.—Three or four depositions were taken by the plaintiff before a Justice of the Peace in Smith County. These were excepted to by the defendant on account of the omission of certain important statements from the caption and certificate. The exception being sustained by the Clerk, appeal was taken to the Court.

At the trial term, on the motion of the plaintiff, he was permitted to bring the Justice of the

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Peace before whom the depositions were taken into open Court, and there have him amend the caption and certificate *so as to show the real facts*, by inserting the statement that his residence, at which the depositions were taken, was "in Smith County, Tennessee," and that he was "not interested in the cause." The depositions were then admitted as evidence. All of this was done over the objection of the defendant.

It was sound and correct practice to permit the amendment to be made in the manner stated. *Bewley v. Ottinger*, 1 Heis., 355; *Carter v. Ewing*, 1 Tenn. Ch., 214. It prevented unnecessary delay, saved the cost of retaking the depositions, and worked no injury to the defendant.

The objection that the act of making the amendment was void because done out of the county in which the Justice of the Peace resided is not well taken. It was not the exercise of a judicial function on his part, but the performance of a purely ministerial act—the correction of a clerical omission, which he could make as well out of his county as in it.

Third.—Pending the appeal in the Circuit Court, Richardson, the plaintiff, died intestate, and the suit was revived and prosecuted to judgment in the name of Charles Swope, as his administrator. The defendant filed a written plea, denying that Swope had been appointed administrator, and issue was joined on the plea.

The trial Judge properly found the issue in

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favor of the plaintiff. The letters of administration were at least *prima facie* evidence of the appointment; and, on the failure of the defendant to produce any contrary proof, the *prima facie* case of the plaintiff became conclusive.

Fourth.—Swope's letters of administration having been granted by the County Court of Trowsdale County, the defendant filed a plea averring that they were void because Richardson did not reside in Trowsdale County, but was a citizen of Smith County, and died there. This plea was stricken out, as on demurrer.

The action of the Court was right. The grant of letters of administration by the County Court of Trowsdale County cannot be impeached in this case. The attack made by the plea is collateral and not direct. It is true that the County Court of the county in which the deceased resided (if he had a residence in but one county), was alone authorized to grant letters of administration upon his estate. Code, § 2203. But the place of his residence was a matter for the determination of the Court in which the application for letters was made. The letters in the present case were granted by the County Court of Trowsdale County; hence, that Court must have found, as a matter of fact, that the decedent resided in that county. Its judgment is binding on all the world until reversed on direct attack—that is, on appeal or writ of error—before the proper appellate tribunal. With respect to the grant of letters

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of administration, the County Courts of this State are courts of superior and general jurisdiction, and their judgments are conclusively presumed to import absolute *verity* when called in question collaterally. 6 Hum., 132; 1 Cold., 289; 4 Cold., 79; 1 Lea, 530; 7 Heis., 93, 94; 9 Lea 160; *Ib.*, 504; *Railway Co. v. Mahoney*, *ante*, 311.

Some of the language of the opinion on page 31, in *Wilson v. Frazier*, 2 Hum., seems to be in conflict with above authorities, but the *decision* made in that case is in accord. *Ib.*, 32.

Of course the rule is not applicable where letters of administration have been granted on the estate of a living person. *D'Arusment v. Jones*, 4 Lea, 251.

Fifth.—There was great conflict in the proof as to the account sued upon. The finding of the trial Judge has the same weight in this Court as the verdict of a jury, and will not be reversed on the facts if there is *any material evidence* to support it. 12 Heis., 464; *Ib.*, 539; 10 Lea, 462; 16 Lea, 492; 1 Pickle, 306.

In this case there is much material evidence, if not a preponderance, in favor of the finding.

Affirm with costs.

Bryant v. State.

BRYANT v. STATE.

(Nashville. February 10, 1891.)

SELLING LIQUORS. *Sale by licensed dealer outside county in which he is licensed. Place of sale.*

B. was convicted of unlawfully selling liquor *in Cannon County* upon these facts: B. resided in Cannon County, there conducting a store. He had a licensed liquor saloon in Rutherford County in charge of a clerk. When parties in Cannon County wanted liquor, B., upon being paid the price and cost of transportation at his store in that county, ordered it from the clerk in charge of his saloon in Rutherford County. The liquor, thus ordered, was put in jugs by the clerk at the saloon in Rutherford County, and there labeled with the names of the respective purchasers, and sent by public conveyance to B.'s store in Cannon County, where it was delivered to the purchasers. B. had no license to sell liquor in Cannon County.

Held: The conviction was proper. The sale was made in Cannon County. The order of B. upon his clerk was, in legal effect, an order upon himself, and a mere subterfuge.

FROM CANNON.

Appeal in error from Circuit Court of Cannon County. ROBERT CANTRELL, J.

JONES & HOUSTON and J. H. CUMMINGS for Bryant.

Attorney-general PICKLE for State.

Bryant v. State.

DICKINSON, Sp. J. Defendant was convicted of selling whisky unlawfully in Cannon County.

It is insisted that the sale was made in Rutherford County.

Defendant, in partnership with another, had a store in Auburn, Cannon County, and he had a licensed saloon in Murfreesboro, Rutherford County, the latter in charge of his clerk. The buyer requested defendant, in Cannon County, to order some whisky from his saloon to be brought by a public conveyance running from Murfreesboro to Auburn, and gave him the money to send for the whisky, and also the money to pay for bringing it to Auburn.

A few days thereafter he went to defendant's store and found several jugs with tags on the handles, and among them his own, marked with his name, which he took. The whisky was put in the jugs in Murfreesboro, and was there marked with the buyer's name, and was placed in charge of the hack-driver, who carried the United States mail, and was delivered by him at defendant's store. Defendant testified that he has ordered as many as eight jugs at a time in this way for purchasers. His clerk testified that he had, he supposed, sent as many as one hundred and fifty jugs to Auburn "to the order of Bryant, defendant."

The order was taken, the money was paid, and the whisky was delivered at defendant's place of business in Cannon County. The order of defendant upon his clerk was an order on himself, and

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was a mere subterfuge. The sale was made in Cannon County, and defendant had no license to sell liquor in that county.

It is insisted that there should be a reversal, because the record shows two fines on two separate indictments.

The record shows that these causes were tried by agreement, which was an express waiver of the objection now raised for the first time.

Judgment affirmed.

Maxwell v. Hill.

MAXWELL v. HILL.

(Nashville. February 10, 1891.)

1. WILL. *Proof of signature of deceased subscribing witness.*

When subscribing witness to will is dead, proof of his signature by persons familiar with his handwriting is allowed in lieu of his testimony.

Code construed: §§ 3012, 3018 (M. & V.); §§ 2171, 2172, 2178 (T. & S.).

Cases cited and approved: *Stump v. Hughes*, 5 Hay., 93; *Haggard v. Mayfield*, 5 Hay., 121; *Crockett v. Crockett*, Meigs, 95; *Jones v. Arterburn*, 11 Hum., 97; *Harrel v. Word*, 2 Sneed, 611; *Alexander v. Beadle*, 7 Cold., 126.

2. SAME. *Subscribing witness not "interested in the devise of land," when.*

A subscribing witness to a will is not "interested in the devise of land" therein disposed of, in such sense as to disqualify him and render the will void, where his interest in the devised land was acquired after the testator's death by inheritance from the devisee.

Code construed: § 3003 (M. & V.); § 2162 (T. & S.).

Cases cited and approved: *Allen v. Allen*, 2 Overton, 172; *Walker v. Skeene*, 3 Head, 1-5.

3. WILL. *Testator's knowledge of contents of will. Presumed, when.*

On trial of issue of *devisavit vel non* it will be presumed, in the absence of any circumstances calculated to excite suspicion, that testator had full knowledge of the contents of his will, where its proper execution and his capacity to make it have been satisfactorily proved.

Cases cited and approved: *Cox v. Cox*, 4 Sneed, 87; *Bartee v. Thompson*, 8 Bax., 513; *Patton v. Allison*, 7 Hum., 332; *Rutland v. Gleaves*, 1 Swan, 200.

4. SAME. *Same. Must be proved, when.*

But this presumption, that testator had knowledge of contents of will, is rebutted and the burden cast upon the proponent to show affirma-

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tively that the testator fully understood and freely assented to the provisions of the will, where any circumstances tending to excite suspicion have attended its execution.

Cases cited and approved: Rutland v. Gleaves, 1 Swan, 200; Barte v. Thompson, 8 Bax., 513; Key v. Holloway, 7 Bax., 575; Wisener v. Maupin, 2 Bax., 342; Cox v. Cox, 4 Sneed, 87; Waterson v. Waterson, 1 Head, 2.

5. SAME. *Same. Examples of suspicious circumstances.*

The fact that testator was so illiterate that he was compelled to make his mark, united with the further fact that the draughtsman of the will is the principal beneficiary under it, are sufficient in such case to rebut the presumption of testator's knowledge of contents of will, and to impose upon the proponent the burden of proving knowledge affirmatively.

6. SAME. *Same. What proof to show testator's knowledge.*

And, in such case, it is sufficient if it be affirmatively shown by any competent evidence that "testator was fully cognizant of the contents of the will and approved it," and that its execution was "fair and free from fraud and undue influence." It is not essential that the proof should be equivalent to the reading of the will to testator by a *disinterested* person.

7. SAME. *Same. Testator's declarations competent to show knowledge.*

Testator's declarations, whether made before or after the execution of his will, with reference to the dispositions he proposed to make or had made of his property, are competent evidence to show whether or not he fully comprehended and approved the will as written.

Cases cited and approved: Beadles v. Alexander, 9 Bax., 604; Linch v. Linch, 1 Lea, 526.

8. SAME. *Same. Case in judgment.*

The will in this case, though signed with a mark and drawn by the principal beneficiary, is sustained by the proof.

9. SUPREME COURT PRACTICE. *No reversal for meager charge.*

This Court will not reverse for meagerness of the charge of the lower Court, if it was correct so far as it went, and there was no request for *additional* instructions.

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Cases cited and approved: Sutherland v. Shelton, 12 Heis., 374; Railroad v. Jones, 9 Heis., 27; Overton v. Bolton, 9 Heis., 762; Sommers v. Railroad, 7 Lea, 201; Railroad v. Gurley, 12 Lea, 46; Knoxville v. Bell, 12 Lea, 157; Railroad v. Wynn, 88 Tenn., 332; Railroad v. Foster, 88 Tenn., 671; Watterson v. Watterson, 1 Head, 6; Mann v. Grove, 4 Heis., 403; Railroad v. King, 6 Heis., 269.

FROM RUTHERFORD.

Appeal in error from Circuit Court of Rutherford County. ROBERT CANTRELL, J.

C. A. SHEAFE and JOHN E. RICHARDSON for Maxwell.

PALMER & PALMER and P. P. Mason for Hill.

CALDWELL, J. This is a contested will case. In 1877 Elvy A. Hill, wife of C. A. Hill, died at her home in Rutherford County. At the time of her death she owned four tracts of land and some little personal property. She died without child or representative of a child, and without father or mother, but left surviving several brothers and sisters and her husband.

At the February Term, 1878, of the County Court of Rutherford County, her husband, C. A. Hill, presented a paper-writing, which was admitted to probate in common form, as the last will and testament of Elvy A. Hill, deceased.

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By this instrument some small bequests—a saddle and her wearing apparel—were given to her sister, Sarah Maxwell, and to his sister, Eliza Haynes, and the residue of her personal estate and all her lands were given to her husband absolutely.

In April, 1888, Sarah Maxwell, a sister of Elvy A. Hill, filed her petition in the County Court to have the probate set aside. C. A. Hill answered the petition, and, proper order being made, the alleged will and proceedings thereon were certified to the Circuit Court, where issue of *devisavit vel non* was made up and tried by Court and jury. Verdict and judgment were for the will, and, motion for new trial being overruled, Sarah Maxwell appealed in error.

The subscribing witnesses to the paper propounded as the will were W. J. Hill and O. W. Hill, brothers of C. A. Hill. The former of these died before the trial in the Circuit Court, and, because of his death, his handwriting and signature were properly allowed to be proved by other witnesses. Code (M. & V.), §§ 3012 and 3018; Caruthers' History of a Lawsuit (Martin's Edition), Sec. 612; 5 Hay., 93 and 121; Meigs, 95; 11 Hum., 97; 2 Sneed, 611; 7 Cold., 126.

C. A. Hill, the principal beneficiary under the alleged will, also died before the trial intestate and without children or child, or representative of either. O. W. Hill is one of his heirs; hence, when he went on the stand to prove the execu-

tion of the will as one of the subscribing witnesses, his evidence was objected to by the contestant on the ground of interest. His evidence was admitted, and the action of the trial Judge in that behalf is here assigned as error.

The witness was competent, and his evidence was properly admitted. The statute relating to this question provides that "no last will or testament shall be good or sufficient to convey or give an estate in lands unless written in the testator's life-time, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses, at least, neither of whom is interested in the devise of said lands." Code (M. & V.), § 3003.

O. W. Hill was manifestly not "interested in the devise" of the lands of the testatrix, though made to his brother. To have been so in the sense of the statute, he must have been a beneficiary under the devise. He had no *interest in the devise* at the time he witnessed the will, nor has he any now. His interest in the land now is as heir of his brother, and not as devisee under the will. At that time he was not even heir of his brother, for no one can be heir of a living person. This construction of the statute is in accord with *Allen v. Allen*, 2 Overton, 172, and *Walker v. Skeene*, 3 Head, 1-5.

Elvy A. Hill was an illiterate person, and made her mark to the supposed will. At the time it was executed she was about fifty-five years of age,

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and in rather feeble health. Her husband was both draughtsman of the instrument and almost the sole beneficiary thereunder. As applicable to these facts, in connection with what occurred when the paper was executed, and before and afterward, the Court instructed the jury as follows: "You must further be satisfied that she was fully apprised of the contents of the will—that it was read over to her, and that she understood the same; also that it was her free and voluntary act, free from fraud or coercion on the part of the husband. You must also find that she was of sound mind and disposing memory at the time of making the will; that she knew her property, her relations, and those having claims to her bounty, and had mind to intelligently dispose of said property. * * * Where a beneficiary under a will is the draughtsman of the will it is a strong circumstance against it, and it devolves upon the plaintiff to show that every thing was fair and free from fraud and undue influence. When a party makes his or her mark to a will, it is not enough to show that the will was duly executed, but it must also be shown that the testator was fully cognizant of the contents of the will, and approved it."

Appellant assigns error on this charge, and insists that it is fatally defective, because the jury were not told that "information acquired from the draughtsman in such a case as this is not sufficient," and that, "under the circumstances of this case,

the proof should be equivalent to having heard the will read over by a disinterested person."

In ordinary cases, where the testator is shown to be of competent capacity, and there are no circumstances of suspicion surrounding the case, it is not necessary to establish by proof that he had knowledge of the contents of the will. Such knowledge will be presumed where formal proof of execution and testable mind are shown, and no opposing facts appear. *Cox v. Cox*, 4 Sneed, 87; *Bartee v. Thompson*, 8 Bax., 513; *Patton v. Allison*, 7 Hum., 332; *Rutland v. Gleaves*, 1 Swan, 200; 1 Greenleaf on Evi., Sec. 33; 1 Jarman on Wills, 46.

But where the person making the will is so illiterate as to make his mark, and the draughtsman of the will is the principal beneficiary, the presumption of knowledge is overcome, and more proof is required to establish the will. Such circumstances cast a suspicion on the will, and it becomes incumbent on the proponent to remove that suspicion by showing affirmatively that the testator fully understood the provisions of the will and freely approved them. Such is the rule deducible from the following authorities: 7 Hum., 332-335, and citations; 1 Swan, 200; 8 Bax., 513; 7 Bax., 575; 2 Bax., 342; 4 Sneed, 87; *Watterson v. Watterson*, 1 Head, 2.

In *Rutland v. Gleaves*, *supra*, the testatrix was old and feeble, and had for several years been addicted to the excessive use of opium and ardent spirits. The will, which was complicated in its

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provisions, was read to her, partly by the witness and the balance by another person, who was the principal legatee; after which the latter held her hand and she made her mark to it. "The Court, amongst other matters not excepted to, instructed the jury 'that if they believed the will was read to the testatrix correctly, and that she was of sound mind, the legal presumption would be that she understood its contents.'" This instruction was held to be erroneous, because it precluded the jury from considering all the facts, and determining from them whether or not the testatrix understood the contents of the will. 1 Swan, 200.

In the 7 Humphreys case the Court told the jury "that, where a party writes a will in his own favor, this circumstance should awaken the vigilance and jealousy of the jury to see whether a knowledge of its contents was brought home to the deceased; for, in such case, it is incumbent on the propounder to show that the contents were known to the testator." This was held to be "a correct statement of the law." 7 Hum., 332. .

In *Cox v. Cox* the testatrix was shown to be so illiterate that she could neither read nor write. She was also very old when the will was executed, and was by the witness seen to "make her mark" to it. As to the rule of evidence in such a case this Court said: "The existence of the fact that the testator cannot read, the law regards as a circumstance not only sufficient to excite suspicion, but to repel the presumption of knowledge of the

contents of the will. It may be of more or less force, according to the facts of each particular case; and the degree of proof requisite to remove such suspicion, and to establish the knowledge of the testator, must necessarily depend upon the circumstances of each case. All that in reason can be necessary is that it shall be made to appear to the entire satisfaction of the jury that the testator fully understood and assented to the provisions of the will." 4 Sneed, 88.

In the Watterson case the testatrix was unable to write or read writing. She had two sons. One of these wrote the will, by which almost her entire estate was given to himself. Judge Caruthers, delivering the opinion of the Court, said there were two grounds of suspicion and distrust—the illiteracy of the testatrix, and the fact that the will was written by the principal legatee. And, in the conclusion of his discussion of the charge of the trial Judge with respect to the evidence required in such a case, he uses this language: "But we think there is no inflexible rule of law that the knowledge of the contents which is required to be established in the case of persons who cannot read, or where the writer of the will gets a large benefit under it, can only be derived from hearing the will read, to be proved either by direct or circumstantial evidence; but all that is necessary is that it must appear to the full and entire satisfaction of the jury that the testator fully understood and freely assented to the pro-

visions of the will. This fact, as to the kind and description of proof, may be made out like any other disputed fact. But, in a case of this description, the strength and conclusive character of it must depend upon the degree of suspicion which the circumstances are calculated to excite, and should be strong and convincing—equivalent at least to the reading of the will, or hearing it correctly read.” 1 Head, 6, 7.

None of these cases, nor any other authorities of which we are aware, warrant the instruction which appellant insists should have been given.

The head-note in the Watterson case is misleading, in that it states that the evidence of the testator's knowledge, in suspicious cases, should be “equivalent, at least, to having heard the will read by a *disinterested* and *unimpeachable* party,” when the language of the opinion is that such evidence should be “equivalent, at least, to the reading of the will, or hearing it correctly read.” A party who is neither disinterested nor unimpeachable might “correctly read” the will. Whether he has done so, in a given case, is a question for the jury.

In all cases of illiteracy on the part of the testator and of great benefit to the writer of the will, the controlling idea, beyond the ordinary proof of formal execution and testable capacity, is that the testator must have fully comprehended the provisions of the will, and freely given his assent thereto. To show this affirmatively, the burden is

upon the proponent. It may be shown by any competent evidence, direct or circumstantial, which is sufficient in weight and cogency to remove all suspicion and satisfy the jury of the fact.

The instruction given in this case comes fully up to the rule in every respect. Summarized on this point it is, that, to find in favor of the will, the jury must be satisfied that the testatrix was fully apprised of its contents; "that it was read over to her, and that she understood the same;" that she "was fully cognizant of the contents of the will and approved it."

Not only was the charge given full and as favorable to the contestant as could have been within the law, but the instruction suggested, for the first time, in the assignment of errors is not sound. But if the charge were not full (being correct as far as it goes), and the instruction suggested were entirely sound, the failure to give it would not be reversible error. To be so, it must have been asked in the form of an additional instruction in the Court below. Mere meagerness in a charge is not ground for reversal. 12 Heis., 375; 9 Heis., 27; *Ib.*, 762; 7 Lea, 201; 12 Lea, 46; *Ib.*, 157; 14 Lea, 65; 4 Pickle, 332, 671, 710; 1 Head, 6; 4 Heis., 403; 6 Heis., 269.

Finally, it is assigned as error, and contended in argument, that "there is no testimony in the record to justify the finding of the jury." Several witnesses say they heard the testatrix state at various times before the execution of her will that

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she desired her husband to have her land for life, with remainder to her brothers and sisters. Others state, with equal certitude, that they heard her say before the date of the will that she wanted him to have it absolutely, and did not want her "folks" to have any interest in it. Some of the witnesses testify that she told them, after its date, that she had made her will, giving her property to her husband. That he was kind and affectionate to her is sufficiently shown. There is some evidence tending to show that she was not on good terms with her own people, and that they had been unkind to her; and, on the other hand, there is evidence tending to show that this is not true.

Her declarations were competent to be considered by the jury in determining whether she fully comprehended and approved the will as written. *Beadles v. Alexander*, 9 Bax., 604; 1 Lea, 526. If it be found that she did, then, of course, the will and not her verbal statements must control the course of her property.

We notice more in detail the testimony of O. W. Hill, one of the subscribing witnesses. He says: "I went to her house and went in. Her husband was out of the room. She picked up a paper, and said it was her will; told me she had signed it, and showed me her mark. She said she had willed my brother every thing she had, except side-saddle and some clothes. I witnessed the will. * * * This is the will [being shown the original will on file]. * * *

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When I first went there she was in the house. My brother, Kit [C. A. Hill, her husband], came in after I got there, before I witnessed the will. He took the will up and read it in the presence of myself and Elvy Hill, at my request. I never sign any thing without having it read. The will read over was the same as what she had told me. I know C. A. Hill's handwriting. This will was in his handwriting. I said to her that it looked like some one else ought to have written it. She said my brother always done her writing, and could do that. He did writing for her both before and after they were married," etc.

If this witness speaks the truth (his credibility was peculiarly a question for the jury), there can be no doubt that the testatrix understood and approved the will. She told him what it contained before it was read in their joint presence; and when he heard it read he found it to be the same as she had previously told him it was; and when the will is produced in Court it is seen to be what she told him it was, and as it was read to them by the draughtsman.

Altogether, the verdict is abundantly sustained. Let the judgment be affirmed with costs.

RAILWAY COMPANY v. WILSON COUNTY.

89 597
 110 598

(Nashville. February 10, 1891.)

1. COUNTY COURT. *Jurisdiction and powers of, purely statutory.*

County Courts possess no jurisdiction or powers but those conferred by statute.

Constitution cited: Art. VI., Sec. 1.

Code construed: § 207 (M. & V.); § 127 (T. & S.).

Case cited: Pope v. Phifer, 3 Heis., 682.

2. SAME. *No statute authorizes release of county taxes on railway property.*

No statute has, in terms or by implication, authorized County Courts to exempt or release, upon any pretext or consideration whatever, the property of a railway company—consisting of its road-bed, rolling-stock, etc.—from its just proportion of taxation for county purposes.

Code construed: §§ 459, 462, 466-472, 562, 565-567, 569, 1322 *et seq.*, 1357 *et seq.*, 1423-1433, 1439, 1465-1512, 1513-1534, 4985-4990 (M. & V.); §§ 402, 404, 408-414, 483, 489, 490, 491a, 1182 *et seq.*, 1241-1251, 1257, 1277 *et seq.*, 1299 *et seq.*, 4206-4217 (T. & S.).

Cases cited and approved: Hunter v. Campbell County, 7 Cold., 55; Grant v. Lindsay, 11 Heis., 667; Wood v. Tipton County, 7 Bax., 112; Cannon County v. Hoodenpyle, 7 Hum., 146; Obion County v. Marr, 8 Hum., 634; Carey v. Campbell County, 5 Sneed, 516; Turnpike Co. v. Davidson County, 14 Lea, 74; Williams v. Taxing District, 16 Lea, 535.

3. SAME. *Same. Exemption void though declared to induce non-resident to build road.*

And such release or exemption of railway property from county taxation is none the less *ultra vires* and void because it was offered as an inducement for the location and building of a railroad, which was accordingly constructed by non-residents, resulting in great benefits, in a general way, to the county.

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4. SAME. *Legislature has not unlimited power to authorize release of railway property from county taxation.*

The Legislature has not unlimited power, under our Constitution, to authorize the County Courts to exempt or release railway property from taxation for county purposes.

Constitution construed: Art. II., Sec. 28; Art. XI., Secs. 9, 10.

Cases cited and approved: Railroad v. Gaines, 3 Tenn. Ch., 611; Ellis v. Railroad, 8 Bax., 530; Chattanooga v. Railroad, 7 Lea, 576, 577; Railroad v. State, 8 Heis., 789, 796; Franklin County v. Railroad, 12 Lea, 547.

FROM WILSON.

Appeal from Chancery Court of Wilson County.
GEORGE E. SEAY, Ch.

J. J. TURNER and B. J. TARVER for Railway Company.

R. P. McCLAIN for Wilson County.

CALDWELL, J. This is a bill by the Nashville and Knoxville Railroad Company against Wilson County and her revenue officers, to restrain the collection of taxes.

On October 3, 1886, the County Court of Wilson County, in quarterly session assembled, passed a resolution whereby it agreed to release from taxation for county purposes all the property of the complainant, then or thereafter in that county,

for the period of fifteen years, beginning with January 1, 1887.

This action was taken, as recited in the resolution, "in order to induce" the complainant "to locate and build its proposed railway from Lebanon, Wilson County, east to Gordonsville, Cookeville, and then along the Cumberland Mountains, across the Cincinnati Railroad, to Knoxville, Tenn.; and because of the great advantages that will accrue to Wilson County from the construction and operating of said through line of railroad." It is alleged in the bill that complainant, "induced in part by this act" of the county, has, at great expense, located, built, and equipped, and is now operating, its line of railway from Lebanon eastward, as contemplated, about forty-five miles, and that the work of construction is still progressing; that the county of Wilson has thereby been greatly benefited in the enhancement of the taxable value of lands to the extent of \$160,000, in the great reduction of the cost of transportation, etc.

It is further alleged that, notwithstanding the said agreement of the county, and the advantages received and to be received by it from the construction and operation of complainant's railway, the county now claims from complainant the sum of \$950.15, as taxes for county purposes for the year 1889, and has caused certain property belonging to complainant to be seized and advertised for sale to pay said sum.

Relying on the release of the County Court,

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complainant claims immunity from taxation by the county for the period stated, and seeks an injunction to restrain the sale.

The defendants demurred to the bill, and for cause said that the action of the County Court in agreeing to release complainant's property from taxation for county purposes, was illegal, null, and void, because *ultra vires* and unconstitutional.

The demurrer being sustained and the bill dismissed, the complainant appealed.

Though the County Court existed, in some form, in North Carolina before the organization of this State, and may be said to have been recognized by our Constitution of 1796 as one of the institutions of the State then existing (*Pope v. Phifer*, 3 Heis., 682), it is, nevertheless, a creature of statute merely, possessed alone of statutory jurisdiction, and wholly wanting in common law powers.

By the Constitution of 1796, all judicial power was vested "in such superior and inferior Courts of law and equity as the Legislature shall, from time to time, ordain and establish;" by the Constitution of 1834, "in one Supreme Court, and in such inferior Courts as the Legislature shall, from time to time, ordain and establish;" and by the Constitution of 1870, "in one Supreme Court, and in such Circuit, Chancery, and other inferior Courts as the Legislature shall, from time to time, ordain and establish." Con. (1870), Art. VI., Sec. 1.

By statute "a Court is established in each

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county of this State, composed of the Magistrates of the county, for the dispatch of probate and other business *intrusted to it*, to be called the County Court." Code (M. & V.), § 207.

The powers "intrusted to" the County Courts thus established, emanate from the Legislature alone; hence, the measure and limit of those powers are to be found in the statutes, and when a power claimed for them is not conferred by some statute it must be held not to exist.

Many sections of the Code have been cited by learned counsel of complainant as, indirectly if not directly, conferring authority to take the action taken by the County Court of Wilson County in the case before us. We notice all of them briefly. County Courts have general statutory powers concerning public roads, ferries, and bridges (Code, §§ 1322 *et seq.*, 1357 *et seq.*, 1423-1433, 4985); as to turnpikes and water-courses (Code, §§ 1465-1512, 1513-1534, 4985); as to control, erection, and disposition of public county buildings (Code, §§ 466-472, 4986); as to levy of tax to build court-house, jail, or public office for county purposes (Code, § 4985, last sentence); as to building of free bridge and paying for same with funds on hand or by special tax (Code, § 4990); as to appropriation of money for seventeen enumerated purposes, but not otherwise, unless expressly provided by law (Code, §§ 4987, 4988); as to exemption of certain poor persons from working on public roads and payment of poll-tax (Code, §§ 2127, 4986); as to permitting

certain poor persons to hawk and peddle without license (Code, §§ 2126, 4986).

Confessedly none of these confer the power in question directly, and it is clear that none of them confer it indirectly. All the objects embraced are so well defined by the language of the statutes themselves that no room is left for the inclusion of a different subject by intendment. The authority to release from the burden of taxation is distinctly confined to poll-tax and privilege-tax, with only poor persons as beneficiaries thereof. Code, §§ 2126, 2127, and 4986.

Section 1439 of the Code is in the following language: "The County Court may provide for making such private and local improvements, within the limits of the county, as are contemplated by the ninth and tenth sections of the eleventh article of the Constitution, under such restrictions, limitations, and conditions as in its discretion shall seem right and proper; such as toll-bridges, causeways across bottoms, fish-traps, mill-dams, ferries, public roads, and the like."

It is obvious, as has been twice correctly decided, that this provision has no reference to works of public improvement, to be undertaken, made, and paid for by the county; but only to private enterprises of more or less public convenience. *Hunter v. Campbell County*, 7 Cold.; 55; *Grant v. Lindsay*, 11 Heis., 667.

And it is quite as manifest from the language used both in the Code as above quoted and in the

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original Act (1835, Ch. 29; Car. & Nich., 203), that it was not in the legislative mind to confer upon County Courts authority to release the property of railroad companies from the common burden of taxation. If such authority exists, it must be found in some other enactment.

Again, "every county is a corporation, and the Justices in the County Court assembled are the representatives of the county, and authorized to act for it." Code, § 459. And "each county may acquire and hold property for county purposes, and make all contracts necessary or expedient for the management, control, and improvement thereof, and for the better exercise of its civil and political powers; may make any order for the disposition of its property, and may do such other acts and exercise such other powers as may be allowed by law." Code, § 462.

It is insisted that, under these provisions, the County Court of Wilson County was authorized to make the contract or agreement in question; that, being the fiscal agent of the county, and having a portion of the sovereign power of the State, it had the power to surrender the right to tax the complainant's property to secure for the people of the county the greater advantage of a well-equipped railway.

We concede that, in the exercise of their powers with respect to public roads and the levy of taxes for county purposes, County Courts are properly said to act as miniature Legislatures, and to

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perform legislative or municipal rather than judicial functions. *Wood v. Tipton County*, 7 Bax., 112; *Grant v. Lindsay*, 11 Heis., 651; 7 Hum., 146; 8 Hum., 634; 5 Sneed, 516; 14 Lea, 74; 16 Lea, 535.

But even in these matters they can do only such acts "as may be allowed by law" (Code, § 462), and "can exercise that portion of the sovereignty of the State communicated to them by the Legislature, and *no more*." 11 Heis., 666.

The two sections last quoted, and the others previously mentioned herein, fail to confer any power to exempt *property* from taxation. The Legislature has therein attempted to communicate no part of the State's sovereignty with respect to such an exemption.

In none of the several statutes cited in behalf of complainant, nor in any other, do we find any authority for a County Court to release the property of a railroad company from taxation on any consideration whatever.

An examination of the statutes relative to county revenue will clearly show that such authority is withheld. "Taxes on property for county purposes shall be imposed on the value thereof, as the same is ascertained by the assessment for State taxation." Code, § 567. "The County Court may impose taxes for county purposes, and fix the rate thereof" (Code, § 566), provided the rate "for general county purposes shall not exceed the rate of State taxation." Code, § 565. Taxes levied by

County Courts "shall be equal and uniform" on every species of property, privilege, or poll which is taxed by the laws of the State (Code, § 569); and "the polls, property, and privileges that are taxable or exempt from taxation for county purposes are the same that are taxable and exempt from taxation for State revenue." Code, § 562.

From these provisions it is manifest that the County Courts must levy "an equal and uniform" tax on all taxable property in their respective counties, and that they can exempt no property from taxation for county purposes that is not also exempt from taxation by the State. They may exempt only such property as is exempt from State taxes, and must assess equally and uniformly all that is subject to State taxation. The property of complainant is not exempt from State taxation; hence, the County Court of Wilson County could not lawfully exempt or release it from taxation for county purposes, but was, by the express terms of the statute, required to tax it at the same rate at which it assessed other property for the same period. Its agreement, however solemnly made, and with whatever view, did not abrogate the law.

The fact that the property of complainant was not in existence at the time the release was attempted to be made, and the further fact that the railway has been constructed and equipped almost entirely with capital owned by non-residents of the State, cannot alter the case, or make valid an agreement which would otherwise be void. There

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is no more power in the County Court to release from taxation a railroad yet to be constructed than there is to release one already completed and in full operation. Nor is there any authority to discriminate in favor of one constructed with foreign capital as against another one constructed with the means of citizens of the State. When constructed, in each instance, it becomes entitled to the protection of the laws of the State, and, in terms, subject to the burden of taxation.

The Constitution confers no such power on County Courts as that attempted to be exercised in favor of the complainant. It declares that "the Legislature shall have the right to vest such power in the courts of justice, with regard to private and local affairs, as may be deemed expedient." Art. XI., Sec. 9. And that, "a well-regulated system of internal improvement is calculated to develop the resources of the State, and promote the happiness and prosperity of her citizens; therefore it ought to be encouraged by the General Assembly." Art. XI., Sec. 10. No power is here conferred on any *Court*.

In the latter section is found a distinct expression in favor of a well-regulated system of internal improvement, and a declaration that it ought to be encouraged by the Legislature; but the means of encouragement are to be devised by the Legislature, within constitutional limitations and restrictions. However broad this provision, however great the power thus conferred on the General

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Assembly, it is certain that it has not, in pursuance thereof, enacted any law authorizing County Courts to exempt railroad property, present or prospective, from taxation for county purposes. Our review of the statutes has demonstrated that fact conclusively.

Moreover, we must not be understood as agreeing that the Legislature has the power to confer any such authority upon County Courts, or to exercise it itself. Section 28 of Article II. of the Constitution requires that equal and uniform taxes shall be laid on all taxable property, and it enumerates the property that *may* be and that *shall* be exempt from taxation by the Legislature. In that enumeration railroads are not mentioned or included; hence, they must be taxed at the same rate that other property is taxed. The language is as follows: "All property, real, personal, or mixed, shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational, and shall except one thousand dollars' worth of personal property in the hands of each tax-payer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be

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equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value." Con., Art. II., Sec. 28.

This constitutional mandate that all property (except that mentioned therein for exemption) shall be taxed, prohibits even the Legislature from granting any other exemption whatever, no matter what the consideration; and if it attempt to do so, the effort is unavailing and void for want of legislative power. *M. & C. R. R. Co. v. Gains*, 3 Tenn. Ch., 611; *Ellis v. L. & N. R. R. Co.*, 8 Bax., 530; *Chattanooga v. Railroad Co.*, 7 Lea, 576, 577; 8 Heis., 789, 796; 12 Lea, 547.

The Constitution has declared what property *shall* be taxed, and what *may* and what *shall* be exempt from taxation. Complainant's property is among that which *shall* be taxed; therefore, there was in 1886, and is now, no power in the Legislature or elsewhere to grant the exemption now claimed. It could not be done even upon the understanding that the railway was yet to be located and built, and that it was to be done with foreign capital. "It is not the nature or extent of the consideration which is to be looked to, but the legislative power." 3 Tenn. Ch., 611.

The exemption attempted by the County Court was *ultra vires* and void.

Affirm the decree and dismiss the bill.

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BANK v. CUMMINGS.

*(Nashville. February 10, 1891.)*1. BANKS AND BANKING. *Case in judgment stated.*

Cummings & Bledsoe shipped from Petersburg, Tenn., to Atlanta, Ga., five car-loads of wheat which had been contracted to the "Tollison Commission Company," of the latter city. They took from the carrier five separate bills of lading—one for each car-load—to themselves or assigns, with indorsement on each: "Notify Tollison Commission Company." C. & B. drew upon said company five drafts—one for each car-load—payable to their own order three days after sight. These drafts, with said bills of lading attached, were delivered by C. & B. to their bankers at Columbia, Tenn., for collection and deposit, without instruction except by direction on margin of each draft to "draw through Gate City National Bank, Atlanta, Ga." The bills of lading were indorsed to "order" of the cashier of the Columbia bank. The drafts, with bills of lading attached, were transmitted at once by the Columbia bank to the Atlanta bank for collection, each draft being indorsed: "Account of Second National Bank, Columbia, Tenn." The bills of lading were sent without indorsement of the cashier of the Columbia bank, and without any instructions as to their surrender. However, they were surrendered to the carrier by the Atlanta bank as soon as the drafts had been presented to and accepted by said company. The drawee company became insolvent, and the drafts were not paid. C. & B. seek to hold the Columbia bank for their loss.

Held: The Columbia bank is not liable to C. & B. upon these facts.

2. SAME. *Surrender of bill of lading. Sight-draft. Time-draft.*

Bank receiving a sight-draft for collection should not surrender an accompanying bill of lading until the draft has been paid; but in the case of a time-draft the bank may deliver up the accompanying bill of lading to the drawee upon his acceptance of the draft, in the absence of instructions or circumstances indicating that the bill was to be held to secure both acceptance and payment of draft.

Case cited and approved: *National Bank v. Merchants' Bank*, 91 U. S., 92.

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3. SAME. *Same. When bill of lading accompanying time-draft must be held to secure payment.*

Bill of lading accompanying a time-draft must be retained by a collecting bank after acceptance of the draft, to secure its payment, when the bill of lading is made deliverable to consignor or his order.

Case cited and approved: 91 U. S., 631.

4. SAME. *Bank effecting collections through another bank. General rule.*

By the great weight of authority a bank receiving a draft for collection, payable at a distant point, has implied authority to send it for collection to a suitable agent at the place of payment, and such agent, when so selected, becomes the agent of the owner of the draft, and is not the agent of the transmitting bank.

Case cited and approved: Bank v. Bank, 8 Bax., 101.

5. SAME. *Same. Negligence of agent.*

And for negligence of such agent, resulting in loss to the owner of the draft, the transmitting bank is not responsible.

6. SAME. *Liability of collecting bank accepting drawee's check in payment.*

Where a bank, receiving paper for collection, accepts in payment the check of the party bound to pay it, and surrenders the paper, whereby injury results to the owners of the paper, the bank is responsible for the loss. But this principle has no application to the facts of this case which are set out in opinion.

FROM LINCOLN.

Appeal from Chancery Court of Lincoln County.
W. S. BEARDEN, Ch.

LAMB & TILLMAN and PADGETT & FIGURES for
Bank.

J. H. HOLMAN & CARTER for Cummings.

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LURTON, J. The questions for decision arise upon the cross-bill of Cummings & Bledsoe against the complainant in the original bill. The firm of Cummings & Bledsoe were dealers in grain and produce at Petersburg, Tenn., and did their banking with the Second National Bank of Columbia, Tenn.

Between July 26, 1887, and August 4, 1887, they shipped by rail five car-loads of wheat to Atlanta, Ga., being part of a larger quantity contracted to be sold to the "Tollison Commission Company," of that city. Five separate bills of lading were taken, one for each separate car, "to the order of Cummings & Bledsoe or assigns," with directions thereon to "notify Tollison Commission Company." Against each shipment a draft was drawn by the consignors upon the Tollison Commission Company, and payable to Cummings & Bledsoe, or order. These five drafts, with the bills of lading pinned thereto, were left with the Columbia bank, entered upon a deposit ticket as if for deposit as a cash item. The drafts were stamped with the indorsement: "For deposit only to credit of Cummings & Bledsoe." The bills of lading were indorsed: "Pay to order of Geo. Childress." No special instructions accompanied these drafts when left in the Columbia bank, other than a direction on the margin of each draft in these words: "By request of parties, draw through Gate City National Bank, Atlanta, Ga."

These drafts were not discounted by the bank,

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nor was credit given for them upon the deposit account of Cummings & Bledsoe. They were entered as having been received for collection, and at once transmitted according to the written instructions on them to the Gate City National Bank, Atlanta, for collection, each draft being stamped with the indorsement: "Account of Second National Bank, Columbia, Tenn." Geo. Childress, to whom the bills of lading had been indorsed by Cummings & Bledsoe, was the cashier of the transmitting bank. Without any indorsement by Childress these bills of lading were transmitted pinned to the drafts, and no direction was given as to whether the bills were to be surrendered upon acceptance by the drawees of the drafts, or held as a security for the payment of the drafts. The drafts were all time-drafts being payable three days after sight. The drafts were, upon receipt by the Atlanta bank, presented to the Tollison Commission Company for acceptance, and upon acceptance the unindorsed bills of lading were surrendered to the acceptors. The wheat was delivered by the carrier to the Tollison company. None of the drafts were paid at maturity, and, after protest, were returned to the Columbia bank as worthless, the wheat having been disposed of and the drawee being insolvent.

Cummings & Bledsoe, by their cross-bill, seek to hold the bank at Columbia responsible for the amount of these five drafts. The first ground upon which liability is sought to be fixed is based

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upon the charge that these drafts were deposited as cash items, and credited to their account as such, and thereby became the property of the bank; that the drafts were well secured by bills of lading indorsed to order of its cashier, and the security having been surrendered by negligence of its agent, acquits them of all responsibility as indorsers of the drafts. The facts do not support this contention. The drafts were not discounted by the bank, and were not entered to the credit of the drawers. There is evidence that some years before this transaction the cashier of this bank, in order to secure their business, agreed to receive and collect checks and sight-drafts without charge, and credit them as cash. This agreement did not extend to time-paper, such as this was, and there is no proof that such paper was ever credited except as collected. Certainly these drafts were only received for collection, and so entered on the books of the bank.

It is next contended that the transmitting bank was instructed to hold the bills of lading until payment of drafts attached, and that the failure to give similar instructions when transmitted is such negligence as makes it responsible. It is not pretended that any such instructions were given concerning these particular drafts *at the time* they were left for collection. The contention of complainants in the cross-bill is that *theretofore* they had given such directions concerning all their drafts with bills of lading attached. The weight

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of proof does not support this insistence. The conversations testified to by Mr. Cummings do not, as stated by himself, necessarily imply any such instruction. The bank's officers most positively deny any such directions, either orally or by letter. The burden of proof is upon Cummings & Bledsoe, and we agree with the Chancellor in holding that they have not satisfactorily shown any such general instruction. This brings us to the question as to whether, in the absence of instructions, the bank at Atlanta was authorized to surrender the bills of lading upon acceptance of the drafts, or whether the facts of the transaction, as indicated by the indorsements on drafts and bills, indicated the intent of the consignors to hold the bills as a security for the payment of the drafts.

It is well settled that when a sight-draft is attached to a bill of lading for the merchandise against which the draft is drawn, that the bill of lading is not to be delivered until payment. It is, however, equally as well settled that if the bill of lading be attached to a time-draft, the transaction imports a sale upon credit, and that the bill of lading is only retained to secure acceptance of the draft, and is to be delivered upon acceptance, unless there be instructions to hold until payment or circumstances indicating that the bill is to be held to secure both acceptance and payment. *National Bank v. Merchants' Bank*, 91 U. S., 92; 2 Daniel on Negotiable Instruments, Secs. 1734a and 1734b.

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But it insisted that the fact that the bills of lading were taken to the order of the consignors, and indorsed by them to the cashier of the bank through which they were to be transmitted for collection, rebuts any implication arising from the fact that they were time-drafts, and therefore sales on a credit, and conclusively shows an intent to hold the title as security for payment of the drafts drawn against the shipment.

Mr. Benjamin, after a thorough consideration of the question in the light of the English decisions, concludes that "the fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee." Benjamin on Sales (Corbin Ed.), Sec. 565.

The same question was before the Supreme Court of the United States in a case where the bills of lading had been taken to the order of the cashier of the bank discounting the drafts drawn against the shipment, and Mr. Justice Strong, in delivering the opinion of the Court, said: "These bills of lading, unexplained, are almost conclusive evidence of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts." *Dawes et al. v. National Exchange Bank*, 91 U. S., 631.

In the case of *Security Bank v. Luttgin*, decided

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by the Supreme Court of Minnesota, the defendant, Luttgin, shipped flour to Baltimore to fill an order, taking bills of lading to their own order. Draft at thirty days after sight was drawn against the shipment. This draft was discounted by the plaintiff, and the bill of lading indorsed in blank and delivered with the draft to the bank. The draft and bill of lading attached were sent by the bank to its correspondent for acceptance. Upon acceptance the bill of lading was surrendered to the drawees, who, becoming insolvent, failed to pay the drafts. The discounting bank thereupon sought to hold the drawer liable to it upon his indorsement. There was proof of an agreement that the bills of lading should not be delivered to the drawees until payment, but the Court said that "the transaction itself, independent of the parol agreement, considered as a matter for merely legal interpretation, did not express or import a sale upon credit, or determine that the drawees were entitled to the bills of lading upon acceptance. The taking of bills of lading making the goods deliverable to the order of the shipper rather than to the person for whom they are ultimately intended, has been considered almost conclusive proof of an intention on the part of the consignor to retain the *jus disponendi*, although subject to be rebutted." 29 Minn., 366.

Upon these authorities we conclude that the bank at Atlanta had no authority to surrender these bills of lading upon acceptance. Though it

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had no instructions, yet the transaction on its face, as a mere matter of legal construction, bore an implication that the intent of the consignor was to retain the *jus disponendi* as a security for the payment of the drafts. Unless, however, the wheat could not be traced after delivery by the carrier, it was recoverable by the consignors.

A special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery without such payment. The person thus acquiring a bill indorsed in blank has been held not to acquire any title to the goods as against the principal. *Stollenwerck v. Thatcher*, 115 Mass., 224.

And third persons dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are chargeable with constructive notice, and acquire no better title than the drawee. *Bank v. Logan*, 74 N. Y., 568; *Heiskell v. Bank*, 89 Penn. St., 155; *Daves v. Bank*, 91 U. S., 631.

It is also questionable whether a delivery by the carrier upon a bill of lading to the order of the consignor, and indorsed to order of the cashier of the transmitting bank, was a good delivery, the cashier never having indorsed the bills to Tollison & Co., or any one else. A carrier must deliver alone to the person named as consignee in the bill of lading, or to his order. This was not done. *The Thames*, 14 Wal., 98.

That the assignment of the bill of lading to the cashier of the Columbia bank placed the title of the wheat in him, is clear. This, however, would not have prevented suit for the wheat, or an action against the carrier. Childress, in whom was the title, was but the agent of the vendors, and, besides, the bank offered to take any legal step deemed advisable by the vendors. None was taken, either to recover the wheat or its value, or to hold the carrier liable, although one of the vendors went to Atlanta and consulted counsel. The question remains, Is the bank at Columbia responsible for the negligence of the bank at Atlanta in surrendering these bills of lading upon acceptance, and enabling the drawees to obtain and make way with the security? By the great weight of authority the bank receiving a bill for collection, payable at a distant point, is impliedly instructed to send such bill to a suitable agent for collection at the place of payment; and such agent, when so selected, becomes the agent of the owner of the bill, and is not the agent of the transmitting bank. *Bank of Louisville v. Bank of Knoxville*, 8 Bax., 101.

If the debt be lost by the negligence of the agent so selected, the right of action is in the owner of the paper, and not in the bank forwarding the paper. *Idem*. The liability of the transmitting bank is only for its own negligence. There can be no question of negligence in the transmission of this paper to the Gate City National

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Bank, for this bank was designated by the drawers themselves. Having received no special instructions as to holding the bills of lading as security for payment of the drafts, they are not liable for neglect. If the transaction on its face imported an intent that the title of the wheat should be retained until payment of the drafts, and that this retention of the *jus disponendi* implied the impropriety of delivering the bills of lading, then the agent selected at Atlanta was as fully advised as to the legal construction inferable from the bills of lading as was the bank at Columbia. The duty of special instructions rested as strongly upon Cummings & Bledsoe as it did upon the agent for transmission. If the Columbia bank should have explained the legal inferences deducible from the state of the title to the bank at Atlanta, then the drawers should have given such explanation to the transmitting bank in the first instance.

One other question remains. The day after two of these drafts had been returned to the bank at Columbia unpaid, a check drawn by Tollison Commission Company against the Gate City National Bank was received by the bank at Columbia in a letter written by the Tollison Commission Company's president, explaining that the drafts had been returned through mistake, and authorizing the Columbia bank to fill up the blank in check for amount of the returned drafts. This was done, and the drafts stamped as paid, and transmitted to the Gate City bank with the check of the

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Tollison company, with directions to deliver the drafts to the Tollison company upon payment of its check. The check was dishonored, and it, with the drafts, returned to the bank at Columbia. When this check was received, it was regarded as good, and at once credited to the account of Cummings & Bledsoe, and notice given them. When it was dishonored, it was charged back to Cummings & Bledsoe. The contention is that this was without authority; that, having received the check in payment of the draft, the bank is bound to make the check good. The authority for this position is Morse on Banking, who says: "If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper up to him, it assumes the responsibility for the check proving good." This is not applicable to the facts of this case. The drafts were never surrendered to the party bound to pay them. The ground of the proposition stated by Mr. Morse is that an agent for collection—as, a bank—can receive nothing but money in discharge of paper held for collection. If a check is taken, and injury results—as, by the discharge of a drawer or indorser—or the bank is unable to return the paper by reason of such unauthorized surrender, then the bank, having exceeded its authority, is liable for all consequences. Daniel on Negotiable Instruments (Corbin Ed.), Sec. 1624.

Here the drafts were sent with check, to be delivered only on payment of check, and were at

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once returned upon dishonor of check. No injury whatever resulted, and there can be no doubt that the course of business between the bank and Cummings & Bledsoe justified charging this check back to them, it having been by mistake passed to their credit.

Decree dismissing cross-bill affirmed with costs.

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SIMMONS v. LEONARD.

(Nashville. February 12, 1891.)

1. CHANCERY COURT. *Has no jurisdiction of issue of devisavit vel non.*Chancery Courts have no jurisdiction to try the issue of *devisavit vel non*.

Code construed: §§ 2173, 2180, 4201, 4227 (T. & S.); §§ 3013, 3020, 4980, 4999 (M. & V.).

Cases cited and approved: Harrison v. Guion, 4 Lea, 531; Townsend v. Townsend, 4 Cold., 70; Burrow v. Ragland, 6 Hum., 486.

Cited and distinguished: John v. Tate, 7 Hum., 392.

2. SAME. *Act 1877 enlarging jurisdiction of Chancery Courts. Construction of.*

Act of 1877, Ch. 97, enlarging the jurisdiction of Chancery Courts has been liberally construed in favor of the extension of the jurisdiction.

Act construed: Acts 1877, Ch. 97.

Cases cited and approved: Hawkins v. Kercheval, 10 Lea, 542; Frazier v. Browning, 11 Lea, 253; McGrew v. City Produce Exchange, 85 Tenn., 572; Williams v. Burg, 9 Lea, 455; Glenn v. Moore, 11 Lea, 256; State v. Keller, 11 Lea, 399; Coal Co. v. Moses, 15 Lea, 300.

3. SAME. *Same. Does not embrace issues of devisavit vel non.*But that Act cannot, even by a liberal construction, be held to embrace issues of *devisavit vel non*, and to confer upon the Chancery Courts jurisdiction to try such issues.4. SAME. *Devisavit vel non not drawn into equity by joining it with matters of equitable cognizance.*Chancery Court will not entertain and try an issue of *devisavit vel non*,

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although it is presented in connection with matters proper for equitable cognizance.

FROM MARSHALL.

Appeal in error from Circuit Court of Marshall County. ROBERT CANTRELL, J.

W. N. COWDEN, W. W. WALKER, and P. C. SMITHSON for Simmons.

JAMES H. LEWIS and JONES & EWING for Leonard.

DICKINSON, Sp. J. Plaintiffs in error filed a bill in the Chancery Court of Marshall County against defendants in error, which embraced matters of equitable jurisdiction, and also asked that an issue of *devisavit vel non* be tried in the Chancery Court in respect of a writing which had been proven in common form as the will of Margaret Simmons. The Chancellor retained the bill as to certain matters, but, being of the opinion that he had no power to try this issue, directed the parties to take appropriate steps to secure such a trial in the Circuit Court.

This cause was brought to the Circuit Court from the County Court by *certiorari*, which was dismissed by the Circuit Judge on the ground

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that the Chancery Court had jurisdiction to fully try and dispose of this issue. Defendants resisted the trial in the Chancery Court on the ground that it did not have jurisdiction, and in the Circuit Court on the ground that the Chancery Court did have jurisdiction, and was successful in both tribunals. The result is that plaintiffs have been denied a trial altogether.

In *John v. Tate*, 7 Hum., 392, it appears that the Chancellor submitted in his own Court an issue to a jury to try the question whether a certain paper was a will. The Supreme Court, while holding that the parties who made the application were estopped by the proceeding, reserved the question whether the Chancellor had power to submit an issue of *devisavit vel non* to be tried by a jury in his Court.

In *Harrison v. Guion*, 4 Lea, 531, this question of jurisdiction was directly passed upon. The Chancellor awarded such an issue, and upon an appeal from his decree it was held that the Chancery Court had no jurisdiction to try such an issue, and that the jurisdiction of the Circuit Court was exclusive. That case was decided in 1880. It originated before the passage of the Act of 1877, Chapter 97, which conferred on the Chancery Court concurrent jurisdiction with the Circuit Court of all civil actions triable at law, except for injuries to person, property, or character involving unliquidated damages, and consequently was decided without reference to that statute. It is

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insisted that this Act conferred upon the Chancery Court the power to try the issue of *devisavit vel non*, inasmuch as it is a civil action triable at law, and does not fall within the exceptions expressly named. This statute has been liberally construed, and has been held to cover cases of mandamus, ejectment, money lost at gaming, covenants running with land, claims for damages on official bonds, claims of damages on bond of Clerk for taking insufficient bond, suits for mistake of public surveyor, and for conversion. *Hawkins v. Kercheval*, 10 Lea, 542; *Frazier v. Browning*, 11 Lea, 253; *McGrew v. City Produce Exchange*, 1 Pickle, 572; *Williams v. Burg*, 9 Lea, 455; *Glenn v. Moore*, 11 Lea, 256; *State v. Keller*, 11 Lea, 399; *Coal Co. v. Moses*, 15 Lea, 300.

All of these suits could have been brought by the parties directly in the Circuit Court in the first instance, and without any preliminary steps in any other Court. The Circuit Court has jurisdiction of causes tried before Magistrates, on appeal, which lies to that Court alone, and to try *de novo*, on appeal provided for to that Court alone, controversies relative to laying off, discontinuing, or establishing any public road or ferry by the County Court, and of condemnation of lands levied upon by virtue of an execution or attachment issuing from a Magistrate.

In the matter of the contest of wills, not only is the Circuit Court clothed with exclusive jurisdiction (Code, § 4227), but it can be acquired by

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that Court only in one way, and that is by a certificate from the County Court, which is the custodian of the will, and has original jurisdiction of its probate, that its validity is contested. It is also provided that the County Court shall send the original will to the Circuit Court, and require the contestants to enter into bond, etc. Code, §§ 4201, 2173. The Circuit Court is merely auxiliary to the County Court, whose jurisdiction is exclusive.

After the trial in the Circuit Court the verdict and judgment must be certified to the County Court to be recorded. Code, § 2180. The County Court has exclusive jurisdiction of probates, and a probate once made cannot be collaterally attacked and set aside in a Court of Equity, but stands until vacated by the proper appellate tribunal; and after a will has been regularly probated, a Court of Chancery has no power to set it up, as this, having been once done, will so continue unless the probate be set aside under proper proceedings in a proper tribunal. *Townsend v. Townsend*, 4 Cold., 70.

All of these are civil actions, and they do not come within the exceptions of the Act of 1877, and yet it cannot with reason be said that this Act was intended to repeal the special provisions of the law applicable to these cases, and defining the channel in which they shall proceed for review so as to allow appeals from Magistrates and the County Court to the Chancery Court, and a return

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of an execution or attachment to the Chancery Court for condemnation of land.

The Act of 1877 does not repeal nor amend these provisions, but they stand in full force. If the contestants of a will should begin proceedings immediately, and by an independent suit in the Circuit Court, then it would necessarily fail, for the probate in the County Court could not be affected by it, and would stand in full force and effect until annulled by direct proceedings in the method prescribed by law. If the independent action would fail in the Circuit Court, it would likewise fail in the Chancery Court. There is no way provided by law to take the proceedings from the County to the Chancery Court, just as there is no way for taking to that Court civil cases tried before Magistrates and execution and attachment proceedings based on Magistrate's judgments. While the Act of 1877 is very broad, and has been liberally construed, it cannot, in order to give effect to the words providing for jurisdiction over all civil actions, with the exceptions set out, be held to so repeal or amend all of the prescribed rules for taking special classes of causes from inferior tribunals to the Circuit Court, so as to make them applicable to the Chancery Court. *A fortiori*, it could not be held to give the Chancery Court jurisdiction to prove wills in solemn form, by proceedings instituted directly in that Court entirely independent of any preliminary steps in the County Court, for then we would have the

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anomaly of an Act which, while purporting only to give the Chancery Court concurrent jurisdiction with the Circuit Court, confers in effect a larger and more independent jurisdiction; for under the rule contended for, the Chancery Court could take cognizance of such a case directly and in the first instance, while the Circuit Court could never do so unless the cause came to it from the County Court.

The statute manifestly did not contemplate such radical and sweeping changes, but only included those civil actions which could originate in the Circuit Court, thus giving litigants the option of bringing their suits in either Court.

It is insisted that the Chancery Court, inasmuch as the bill contained matters of equitable cognizance, should have retained it for all purposes. It is a familiar rule of equity, and one often applied in this State, that a Court of Chancery, having obtained jurisdiction of a cause for any purpose, will retain it until the whole matter is disposed of, and the rights of the parties are settled. Under this rule Courts of Chancery have, in a great variety of cases, given relief in matters which would not have been otherwise entertained, but it has not, by its application, undertaken to draw to itself the functions of other Courts exclusively vested with the power over special proceedings, such as probate of wills. The Chancery Court has no power to prove a will in solemn form. When an executor has proven a will in common form, those wishing to assail it

cannot do so by bill in chancery, but must proceed, under statutory provisions, in the County and Circuit Courts. *Burroughs v. Ragland*, 6 Hum., 486.

This decision does not affect the authority of that class of cases holding that a Court of Chancery may set aside a verdict upon an issue of *devisavit vel non* obtained by fraud, or set up a will that has been lost or destroyed, or spoliated or suppressed, as they rest upon an independent and well-established ground of equitable jurisdiction.

This cause is reversed, and remanded for a trial in the Circuit Court upon the issue of *devisavit vel non*.

Wallace v. Lincoln Savings Bank.

WALLACE v. LINCOLN SAVINGS BANK.

(Nashville. February 14, 1891.)

1. CORPORATIONS. *Action against directors for loss to corporation caused by their negligence. Recovery for benefit of all share-holders.*

In suit against officers or directors of a corporation for losses caused by their neglect and mismanagement of the corporate affairs, whether it is prosecuted by the corporation itself, or, in a proper case, by a creditor or share-holder thereof, the recovery therein inures to the benefit of the corporation—all its creditors and share-holders, innocent and guilty, sharing therein according to their respective rights. (*Post*, pp. 634, 635.)

2. SAME. *Same. By whom and in what Court maintainable.*

Primarily such suit is maintainable at law and by the corporation alone.

But share-holders and creditors can maintain it, in a Court of Equity, when the corporation is disabled to sue, or wrongfully refuses, upon proper demand, to do so, but not otherwise. (*Post*, pp. 634, 635.)

3. SAME. *Same. Demand to sue, of whom made.*

Before a creditor or share-holder can maintain such suit he must, in the case of a going corporation that is not disabled to sue, prefer his demand for the bringing of suit to the board of directors, not to the president alone, of the corporation; and, in case of an insolvent corporation that has made a general assignment, the demand must be made of the assignee. (*Post*, pp. 634-636.)

Cases cited and approved: *Hume v. Bank*, 9 Lea, 744; 37 N. J., 273; 86 Ky., 530; 87 Ky., 306; 88 N. Y., 52.

4. SAME. *Same. Discretion as to refusal to sue.*

The board of directors possess large discretion, and their refusal, in good faith, to bring such suit, will rarely be overruled by the Courts at the instance of a creditor or share-holder of the corporation. The assignee of an insolvent corporation has a more limited discretion in this matter. (*Post*, pp. 636-638.)

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5. SAME. *Same. No recovery of dividends improperly paid.*

There can be no recovery, by or on behalf of share-holders in such suit, for dividends improperly declared and paid out to the share-holders themselves. (*Post*, p. 641.)

Case cited: L. R. Ch. Cases, Vol. IV., p. 582.

6. SAME. *Same. Statute of limitations applicable.*

And such suit, whether brought at law by the corporation itself, or in equity by a creditor or share-holder for its benefit, is alike subject to the bar of the statute of limitations. (*Post*, pp. 648-650.)

Cases cited and approved: *Hughes v. Brown*, 88 Tenn., 578; 71 Penn. St., 11; 11 Ala., 191; 38 N. J. Eq., 383; 99 N. Y., 193.

Cited and distinguished: *Shea v. Mabry*, 1 Lea, 319.

7. SAME. *Same. What statute of limitation applicable.*

The statute of limitations of six, not of three, years is applicable to suits of this particular description. The suit is not for injury to or conversion of property, but upon the directors' implied contract that they will exercise ordinary diligence in the discharge of the duties of their office. (*Post*, pp. 650, 651, 655.)

Code construed: §§ 3470, 3472 (M. & V.); §§ 2773, 2775 (T. & S.).

Cases cited and approved: *Bruce v. Baxter*, 7 Lea, 477; *Ramsay v. Temple*, 3 Lea, 253.

8. BANKS AND BANKING. *Duties and responsibilities of bank directors.*

Bank directors are held to the exercise of only ordinary care and diligence in the discharge of their duties. They are not required to give their whole time and attention to the performance of these duties, but only so much as, under the special circumstances of each particular case, may be demanded for the reasonable protection of the interests committed to their care. They are not insurers of the fidelity or capacity of the cashier or other agents to whom the business and assets of the bank may be intrusted, but are required to exercise due care in their selection and proper supervision over their action. (*Post*, pp. 652-654.)

9. SAME. *Same. Responsible for cashier's acts, when.*

It is gross negligence in bank directors to commit the entire business of the bank to the cashier, without supervision or control on their part, although he may be an entirely competent man; and they are respon-

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sible, in such case, for all losses resulting to the corporation from the negligent or criminal acts of the cashier, provided such losses could have been prevented by the exercise of proper diligence on their part. (*Post*, pp. 653, 654.)

10. SAME. *Same. Burden of proof.*

In suit against bank directors to charge them with losses which it is averred the corporation sustained in consequence of their negligence, the burden is upon the complainant to prove not only the losses sustained, but that they resulted from the directors' negligence. "One who seeks to recover for negligence must allege and prove it." (*Post*, p. 654.)

11. SAME. *Same. Measure of cashier's duty.*

A bank cashier is required to exercise reasonable skill, care, and diligence in the discharge of his duties. He does not guarantee the solvency of customers. He is not responsible for mere mistake of judgment. Neither he nor the bank directors, however negligent they may have been in their control and supervision of the affairs of the bank, are responsible for losses that resulted notwithstanding the exercise of due skill and diligence on the part of the cashier, and would have resulted notwithstanding proper supervision and control of the corporate affairs by the directors. (*Post*, p. 643.)

Case cited: 48 N. Y., 305.

12. SAME. *Same. Negligence without damage.*

Bank directors, though negligent, incur no liability, if no loss resulted to the corporation from their negligence. (*Post*, pp. 644-648.)

13. SAME. *Same. For usury.*

Bank directors, though negligent in their supervision and control of the corporate affairs, are not responsible for the failure to collect a well-secured debt for the reason that usury was included therein. (*Post*, p. 648.)

14. SAME. *Same. For overdrafts.*

Bank directors, though negligent in their supervision and control of the corporate affairs, are not responsible for overdrafts permitted by the cashier to a reasonable extent in favor of responsible customers. "It is not negligence *per se*, in the absence of a by-law or order of a superior officer, for a cashier to pay the overdraft of a responsible customer." (*Post*, p. 655.)

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15. SAME. *Same. Same.*

Bank directors are not responsible in any case for overchecks permitted to customers by the cashier without their authority or knowledge.

Question reserved: Is it negligence in a cashier to pay overchecks to a reasonable amount of regular customers, who had but little property, but who had credit and were accustomed to pay their debts?

16. SAME. *Same. Same. Notice.*

The fact that such overchecks appeared upon the bank books does not affect the directors with notice thereof, in a suit between the directors and the bank. (*Post*, p. 659.)

Cases cited and approved: 87 Ky., 323; 36 Fed. Rep., 617; 25 Ch. Div., 725; 110 U. S., 8.

Cited and distinguished: *Lane v. Bank*, 9 Heis., 437.

17. SAME. *Same. Same. By cashier in his own favor.*

A resolution by a board of bank directors intrusting the lending of money and discounting of paper to the discretion of the cashier does not authorize him to lend to himself. (*Post*, p. 646.)

FROM LINCOLN.

Appeal from Chancery Court of Lincoln County.
GEORGE E. SEAY, Ch., sitting by interchange.

LAMB & TILLMAN and COOPER & FRIERSON for
Wallace.

CARMACK & WOODARD, J. H. HOLMAN & CARTER,
and A. S. MARKS for Respondents.

LURTON, J. This is a bill by a share-holder
and creditor of the Lincoln Savings Bank in be-

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half of himself and all other share-holders and creditors against such directors of the bank as held office at different times between the organization of the bank, in 1870, and its suspension in 1886. The other defendants are the corporation itself, under its corporate name, and the trustee of the corporation under a general assignment for benefit of creditors made in August, 1886. The bill charges that the defendant directors, by their inattention, negligence, and mismanagement, have been guilty of a breach of trust, whereby the bank has been reduced to insolvency, its capital wasted, and the shares rendered worthless.

There was a decree in favor of complainant for the use of the corporation against several of the defendants, holding them liable for certain losses sustained through improvident discount, overchecked accounts, and neglect to bring suits upon matured paper. The decree has been appealed from by complainant and defendants. Such a bill cannot be maintained by complainant for his peculiar and personal benefit. The wrongs complained of do not especially affect his stock or his demands as a creditor. The negligence of the defendants was in the discharge of duties to the corporation as such; and the corporation, for such negligence, has a right of action. Primarily, therefore, such suit should be brought by the corporation in its corporate name; and only under peculiar circumstances will a creditor or stockholder be permitted by Courts of Equity

to bring the suit which the corporation has failed to bring. But where the corporation is disabled from suing—as, where the managing agents of the corporation, its officers and directors, are themselves to be the defendants, or where the corporation wrongfully and willfully refuses to sue—then, in either case, a Court of Equity will entertain a suit by a share-holder, substituting him to the collective or corporate right of action. In either case it is most obvious that the recovery must be for the benefit of the corporation, all its creditors and share-holders, innocent and guilty, sharing proportionately in the benefits of the decree. The learned Chancellor was correct in holding that the decree obtained by complainant inured to the benefit of the corporation, and that complainant was not entitled to any preference or priority over other creditors or stockholders. The assignment of errors on this point by complainant is therefore overruled.

The defendants were not in office at the time this suit was begun. The corporation was not therefore disabled from suing by being in the hands and under the control of the parties to be sued. It must therefore appear, before complainant will be suffered to carry on such a suit, that the corporation, or those authorized to represent it, have been requested to sue, and that they have wrongfully refused to bring the suit.

It by no means follows that the mere refusal of the corporation to bring a suit will authorize any

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stockholder dissatisfied with such decision to himself conduct the suit. A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such associations to bring suit upon every supposed wrong or injury to the corporation. If it were so strangers could never know when a settlement, compromise, or adjustment was a finality if the matter was subject to be overhauled at the suit of any discontented share-holder. So a suit might appear so desperate, or be so expensive, or, for good reasons, impolitic, that directors might, in the exercise of a sound discretion, deem it unwise to engage in litigation. In such case, if the refusal be in good faith, the Courts will rarely suffer a share-holder to overturn such decision by entertaining his suit for the same cause of action. To authorize his suit, the refusal of the corporation to sue must appear to have been wrongful. Morawetz on Private Corporations, Sec. 244.

The bill alleges and the proof shows that the president of the defendant corporation was duly requested to bring an action in the corporate name against the former directors for the cause of action stated in this bill. This he declined because he did not deem the facts submitted to him justified such suit. This demand was not laid before the directors then in office, and they have never been requested to sue, nor have they declined to sue. The directors, not the president, represent the corporation. ✓ The failure to show that a ma-

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jority of the board had wrongfully refused to bring such suit, would be fatal to complainant's right to sue but for certain facts now to be stated.

In August, 1886, this bank was hopelessly insolvent, and, in that situation, a general assignment of all its assets was made to the defendant, Hancock, as trustee, for the benefit of all creditors, any surplus to be paid over to the corporation. Hancock accepted the trust and qualified as trustee. Subsequently he was requested to bring this suit and declined, deeming himself unauthorized. This right of action passed as an asset to the trustee. *Hume v. Bank*, 9 Lea, 744.

After the assignment he represented the corporation as well as its creditors, and was alone authorized to have sued upon a corporate right of action. This point has been repeatedly settled by other Courts. *Williams v. Hilliard*, 38 N. J., 376; *Ackerman v. Halsey*, 37 N. J., 273; *Jones et al. v. Johnson et al.*, 86 Ky., 530; *Savings Bank, etc., v. Caperton*, 87 Ky., 306; *Brinckerhoff v. Bostwick*, 88 N. Y., 52.

In the case last cited the suit was against the directors and officers of an insolvent national bank in the hands of a receiver appointed under the provisions of the national banking law. The receiver had refused to sue. The Court held that the right of action was in him, and his refusal authorized a share-holder to present a bill in behalf of himself and all other share-holders, the

receiver and the corporation being made defendants. The decision was not based upon any of the peculiar provision of the Act of Congress concerning effect of appointment of a receiver, or liability of officers and directors of national banks, but was squarely planted upon the general principles governing Courts of Equity in such cases. We do not think that the trustee of an insolvent corporation would have so wide a discretion as to suing as exists in the directors of a solvent and going corporation. In the case of the refusal of the managers of a corporation, an appeal would lie to the general meeting of share-holders; and if in such refusal they did not represent the will of a majority, it could be then made to appear, and a board elected who could reverse their action. From the refusal of the trustee there was no appeal save to a Court of Equity. The case presented on the face of the bill was not frivolous, but was so grave in character and important in amount as to have made it the duty of the trustee to have submitted the charges to the decision of a Court.

This bank was organized in 1870 under a private charter granted by this State in 1869. The capital stock was one hundred thousand dollars, all of which was ultimately paid in. Some of the defendants were elected directors in 1870, and by annual re-election continued in office until 1885 or 1886. Others served for very short terms, while still others held office for from one to ten years.

They are not charged with any sort of fraudu-

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lent collusion. Indeed, no intimation is found in pleadings or proof that any one of them profited directly or indirectly by any of the alleged acts of mismanagement or negligence. All of them were stockholders, largely interested in the success of the association, and all suffered equally with complainant by its disastrous failure.

The liability of defendants to the corporation is predicated alone upon the proposition that certain losses sustained by the bank during its fifteen years of business activity were the direct consequence of the negligence of defendants while directors. The principal fact constituting this alleged negligence is a charge that the board of directors abdicated their trust by failure to supervise the management, and turned over the entire control of the business of the bank to the unlimited discretion and unaided judgment of the cashier; that, as a consequence, the bank had sustained great losses through a series of unwise, indefensible transactions, engaged in by the cashier without the aid, advice, and supervision of those charged by their selection with the duty of exercising an intelligent judgment in the control of that officer. The allegation necessarily is that these transactions, so disastrous in their consequences, would have been avoided, and these losses escaped, but for the negligence and inattention of defendants in office at the dates of the several transactions. The losses alleged to be a consequence of this breach of duty may be conveniently classified as follows:

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First.—That there is an unexplained deficit of about \$40,000, the proof of which consists in the fact that the liabilities of the corporation, including its capital stock of \$100,000, exceeds in amount the nominal value of all assets, good and bad, by the sum stated. This difference between liabilities and nominal assets is charged to be a deficit for which defendants must account. The books of the bank are no part of the record. No balance-sheets are exhibited, and no expert testifies as to • the state of the bank as shown by its books. There are many ways in which this deficit of nominal assets may be accounted for. Debts deemed worthless ought to be charged off to profit and loss; in which case they would no longer appear as an asset. This, indeed, appears to have ✓ been done to the extent of perhaps \$20,000. But a more certain solution of this matter is found in the fact that 126 per cent. has been paid out in ✓ dividends upon paid-up stock. A profit justifying such dividends was made to appear by carrying as solvent large amounts of paper held by the bank which subsequently turned out to be wholly ✓ or partially worthless. So real estate taken for debt continued to figure as an asset of the value of its cost to the bank, whereas large losses were subsequently sustained when sales were made.

Again, in the statements to the directors, made by the cashier, of the business of the bank no overdrafts are shown. His habit was to deduct overchecks from aggregate amount due depositors.

This was delusive, for large losses ultimately resulted from these very overdrafts. Thus it is a case where capital has been paid out in dividends, and the assets reduced below liabilities. Complainant does not seek a recovery of this deficit or for dividends improperly paid. It is obvious that he could not, directly or indirectly, be allowed to again recover money already once paid him in the shape of dividends. *Turquand v. Marshall*, L. R. Ch. Appeal Cases, Vol. IV., p. 582.

In that case Lord Haverly said of a suit against directors by share-holders, in part originating in improper payment of dividends, "that this was a very singular claim, as, in fact, it was asking the directors to pay over again to the share-holders what they had already received as dividends."

The Chancellor was clearly right in refusing to hold defendants to an account as to this so-called deficit. The second assignment of error by complainant is therefore overruled.

Second.—The bill charges that within a few years after organization over \$50,000 of the capital appeared to have been invested in real estate; that ultimately losses approximating \$20,000 were sustained by reason of this diversion of assets. The facts do not sustain this charge. The bank did, at one time, own real estate costing nominally \$50,000; but this was the result of foreclosure of mortgages and execution sales. The panic of 1873 and the hard times ensuing, together with local crop failures, operated to ruin large numbers of the bank's

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debtors. In some cases mortgages were taken, and in others suits were brought. It was deemed safe to bid the bank's debts upon lands sold under execution and at foreclosure sales. For years following real estate steadily declined, and was almost unsalable. The bank held, hoping to save itself. Ultimately the losses complained of were realized. There is nothing in the evidence tending to show any thing more than bad judgment in the management of debts, good when made, but imperiled by subsequent events. Indeed, the proof hardly makes out a case of error in judgment; for the probability seems to be that, in bidding the debts upon the lands and holding for a better market, the bank's officers did what the most prudent and sagacious would have done at the time and under same circumstances.

Complainants, however, insist that all the loans represented by this real estate were made by the cashier, and without the approval or knowledge of the directors or any committee, and that all the subsequent steps resulting in its acquisition were taken by the cashier, possibly with knowledge and approval of the president of the corporation, but without the knowledge or consent of the board of directors. This is perhaps true, for it is shown that the first board of directors by resolution gave the cashier exclusive charge of the loans and collections of the bank, and that down to perhaps as late as 1880 this responsibility was reposed exclusively in that officer, the directors during all

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that time rarely meeting and having little, if any, knowledge of the business of the bank beyond what appeared in the annual statements made by the cashier to the directors and stockholders. Ordinarily this would constitute such gross negligence as to make directors responsible both for the criminal defaults and negligent acts of the cashier. There are circumstances, however, to which it may hereafter be necessary to refer, which much mitigate this apparent abdication of duty. Ignoring these circumstances, and treating this as responsible negligence, complainant can only fix liability upon defendants by first convicting the cashier of negligence in regard to these transactions.

A cashier is bound to exercise reasonable skill, care, and diligence in the discharge of his duties. If he fails in such skill, or omits such care, and the bank suffers damage as a consequence, he is liable. If intrusted with the duty of making loans, he is not responsible as a guarantor of the solvency of his transactions, or responsible for an error of judgment where he has exercised reasonable skill, diligence, and prudence. *Bank of Albany v. Ten Eyck*, 48 N. Y., 305.

Complainant has not shown that there was any want of care or prudence in making these loans, or in the subsequent steps taken to secure or collect them. If the cashier is not chargeable with any want of care or skill about these matters, then it follows that defendants are not liable, for they, at most, can only be liable for losses resulting

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from his negligence in these matters. There was no negligence in the selection of the gentleman then filling the office of cashier. He bore a very high reputation as a business man of integrity and intelligence, and was better acquainted with the credit of the customers of the bank than any man in the county. We therefore concur with the Chancellor in ruling that no liability attaches to any of defendants by reason of losses ultimately resulting from shrinkage in values which human foresight could not guard against.

Third.—The next loss with which it is sought to charge the directors is one of \$20,000, said to have resulted from loans made to the cashier, Hampton, and to the firm of Carloss & Hampton, of which he was a partner. Hampton began borrowing as early as 1873, either for himself or his firm. His notes were, from time to time, renewed and other sums borrowed until the indebtedness of the two men reached the enormous sum of \$50,000 in 1879. During this year the directors, for the first time, discovered these transactions. Hampton was himself a large share-holder, having in his own name something over \$10,000 in stock. Under the charter the bank was given a lien upon the shares of a borrowing stockholder for the security of his loans. It appears that the president of the corporation had authorized Hampton to borrow to the extent of his stock, it being then at a premium. With this exception none of the directors were aware of the fact that their cashier

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was borrowing from the bank; and all, including the president, were greatly surprised when, in 1879, the extent of his indebtedness was discovered. Hampton was regarded as a man of fine estate and rare financial capacity, and the bulk of the stock was taken by subscribers upon the understanding that he was to be made the cashier, and, as such, to have the management and control of the bank. After his election the first official act of the directory was, by resolution, to give him exclusive control of the discounts of the bank. No by-laws were adopted at any time by the share-holders, and none by the directors for their own government. None of the directors, originally or subsequently elected, had had any experience whatever in the banking business. Confidence in Hampton's integrity and financial ability seems to have underlaid the action of share-holders and directors alike. A portion of the directors were country gentlemen, living remote from the location of the bank. Others were lawyers and merchants of Fayetteville, but all fully occupied with their personal affairs. The president of the bank, up to his death in 1885, was the late Col. D. W. Holman, a lawyer of large practice, which very fully engaged his time and energy. He was allowed a small salary, and seems to have been much about the bank, much consulted by the cashier, and to have given the business of the bank a general supervision. Having died before the institution of this suit, we have not had the

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benefit of his evidence; but, from all that is shown, he only consented to the borrowing by Hampton of a sum equal to his stock, and was wholly ignorant of the subsequent large loans. Up to the discovery of these loans to Hampton and his partner, the directors had had few meetings, and knew little of the business of the bank. Its management was intrusted to the judgment and discretion of the cashier, with such general supervision as the president was able to give. The resolution intrusting the lending of money and discounting of paper to the discretion of the cashier did not authorize him to lend to himself. He could not represent himself and the bank at the same time, and his conduct in this matter is not to be defended, and was a clear breach of duty upon his part. So soon as these loans were discovered the directors resumed the general control and management of the bank. Hampton was in a short time superseded by a new cashier of high character and experience. Such steps were taken as resulted in obtaining security by way of collaterals or mortgages, amply protecting the bank against loss on these loans. By sale of collaterals, and payments by the debtors, these debts were finally reduced to about \$28,000. After several extensions suit at law was brought upon the unpaid balance. This suit was enjoined by the debtors by bill in chancery, seeking an account of usury, and claiming that the entire sum remaining due consisted of usury, which had from time to time been com-

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pounded. This suit was pending when complainants' bill was filed; but before the hearing the trustee, Hancock, compromised the matter by accepting \$8,000 in full of the notes for \$28,000 remaining unpaid. For the loss thus sustained complainants seek a decree against the defendants in office when these loans were made.

In the view we take of this matter it is unnecessary for us to consider whether the ignorance of the defendant directors of the fact of these loans is, under the peculiar circumstances of this case, such negligence as to make them chargeable with the consequences to the corporation. Assuming their responsibility if loss occurred, did the bank sustain any loss as the direct consequence of the negligence of the defendants in not preventing such use of the bank's funds by its own cashier? We think no such loss is shown. The balance due on the notes of Hampton & Carloss was amply secure at the time the trustee compromised their liability. This compromise was not made by reason of any insolvency of the debtors or any infirmity in the securities held by the bank. The only defense was usury. The trustee regarded the whole debt as in peril by reason of this defense. The debtors claimed that the entire balance of \$27,000 or \$28,000 was for usury. If this was true it was a complete answer to the demands of the bank. The compromise was urged by a majority of the share-holders. The trustee submitted to the Chancery Court his power in the premises,

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which being held ample, he, as for the best interest of creditors and all concerned, agreed to the proposed settlement. Defendants cannot be held liable because usury upon a well-secured debt has not been collected. The settlement is a bar to a suit against them by the corporation, and therefore a bar to complainant's bill so far as this item is concerned. But upon another and distinct ground complainant cannot recover, and that is the bar of the statute of limitations. None of these loans were made after 1879. The negligence of defendants, if any there was, occurred prior to January 1, 1880. This suit was begun in December, 1886, more than six years after the last act of negligence in this matter. The Chancellor seems to have entertained the opinion that because a stockholder can alone sue in equity upon such a cause of action, that therefore this was one of that class of purely equitable actions against which the statute does not operate. But, as we have before seen, this kind of suit is, at last, but the suit of the corporation for its benefit and upon its right of action. If for any reason the corporation is estopped from suing, or its action is barred, the suit by the stockholder or creditor is likewise affected. "A suit of this character," says Mr. Morawetz, "is brought to enforce the corporate or collective rights, and not the individual rights of the share-holders. It may therefore properly be regarded as a suit brought on behalf of the corporation, and the share-holder can enforce only

such claims as the corporation itself could enforce. Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a share-holder. Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, as to limitations, etc., because a share-holder has brought suit in equity to enforce it on behalf of the company." Sec. 271.

Directors are not express trustees. The language of Special Judge Ingersol in *Shea v. Mabry*, 1 Lea, 319, that "directors are trustees," etc., is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. They are mandatories; they are agents; they are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith; they do not hold the legal title, and more often than otherwise are not the officer of the corporation having possession of the corporate property; they are equally interested with those they represent; they more nearly represent the managing partners in a business firm than a technical trustee. At most they are implied trustees in whose favor the statutes of limitations do run. *Hughes v. Brown*, 88 Tenn., 578; *Spering's Appeal*, 71 Penn. St., 11; Morawetz on Corporations, Sec. 516.

An action at law lies in favor of the corpo-

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ration against directors for malfeasance, misfeasance, or negligence in office, whereby loss or damage has resulted; and the limitation applicable to the suit of the corporation at law is equally applicable to the suit of the stockholder upon the corporate right of action in equity. Morawetz on Corporations, Sec. 271; Cook on Corporation Law, Sec. 701; *Godbold v. Bank of Mobile*, 11 Ala., 191; *Williams v. Hilliard*, 38 N. J. Eq., 383; *Spering's Appeal*, 71 Penn. St., 11; *Brinckerhoff v. Bostwick*, 99 N. Y., 193.

Our statutes of limitation operate upon all causes of action save suits between *cestui que trust* and express trustee under pure technical trusts cognizable only in Courts of Equity. *Hughes v. Brown*, 88 Tenn., 578.

The statutes of six and three years were relied upon by defendants, both by demurrer and plea, as applicable to complainants' entire cause of action. By § 2773 it is provided that "actions for injuries to personal or real property, actions for the detention or conversion of personal property," shall be barred unless suit is brought within three years from the accruing of the cause of action. This is not a suit for either injury to or conversion of personal property, and this section is not applicable. The last clause of § 2775 provides a limitation of six years for all actions "on contracts not otherwise provided for." The case of *Bruce v. Baxter*, reported in 7 Lea at page 477, was a bill in chancery against an attorney

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for neglect of duty in the collection of claims in his hands, whereby they were lost. The clause we have quoted from § 2775 was held applicable to the suit. The reasoning of Judge Freeman, who delivered the opinion of the Court, was that the relation of client and attorney implied a contract for the exercise of reasonable skill and diligence in doing what was undertaken, and that a failure to exercise such diligence was a breach of contract rendering the attorney liable for the loss resulting, but no more. A similar ruling was made in the earlier case of *Ramsay v. Temple*, 8 Lea, 253, it being a suit against an attorney for negligence in failing to sue out an execution. Those cases are controlling in this. The relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties he undertakes by accepting the office. For a breach of this duty an action lies, which is barred unless begun within six years from the time right of action accrued. There has been no fraudulent concealment of the cause of action by defendants, and the remedy of the corporation for any negligence in the matter of the loans to Hampton, or Hampton & Carloss, is barred.

Upon the pleadings and proof the Chancellor dismissed complainants' bill so far as it was sought to fix liability by reason of the matters heretofore considered. As to losses claimed to have resulted from overchecks, save certain items which he held unsupported by evidence sufficient to justify a

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reference, and losses resulting from improvident discounts, and claims lost by neglect to collect before insolvency or barred by limitation, he ordered a reference to the Master, laying down very distinctly the grounds upon which the defendants were to be charged. Upon this report and exceptions thereto, decrees were finally pronounced against defendants, aggregating about four thousand dollars. Errors have been assigned by both parties upon the decree of reference as well as upon the final decree. The first error assigned by complainant is that the Chancellor put upon complainant the burden not only of showing losses sustained by the corporation, but that such losses were attributable to the negligence of defendants.

Directors, by assuming office, agree to give as much of their time and attention to the duties assumed as the proper care of the interests intrusted to them may require. If they are inattentive to these duties, if they neglect to attend meetings of the board, if they turn over the management of the business of the company to the exclusive control of other agents, thus abdicating their control, then they are guilty of gross negligence with respect to their ministerial duties; and if loss results to the corporation by breaches of trust or acts of negligence committed by those left in control, which by due care and attention on their part could have been avoided, they will be responsible to the corporation. The diligence required from them has been defined as that exercised by prudent

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men about their own affairs, being that degree of diligence characterized as ordinary. If a less degree of diligence is exercised, the negligence is gross, and for losses consequent he is liable. "What constitutes a proper performance of the duties of a director," says Mr. Morawetz, "is a question of fact which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration." Morawetz on Corporations, Sec. 552.

Bank directors are not expected to give their whole time and attention to the business of the company. The customary method in regard to such associations is that the active management and responsible custody is left to the cashier and other agents selected by the directors for that purpose. These are paid salaries, demanding their skill and time should be given to the duties of immediate management. As a rule the custodian of the assets is the cashier. The duty of directors with respect to such is to supervise, direct, and control. These agents, though usually selected by the directors, are not the agents of the directors, but agents of the corporation. Mor. Corp., Sec. 552 *et seq.*

The neglect which would render them responsible for not exercising that control and direction properly must depend upon the circumstances of each particular case. They are not insurers of their

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fidelity, and they are not liable for their acts on any principle of the law of agency.

"Directors," says Mr. Morawetz, "can be held responsible for a loss resulting from wrongful acts or omissions of other directors or agents only provided the loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with attention, or in neglecting to use proper care in the appointment of such agents." Morawetz on Corporations, Sec. 562.

The collection of matured paper and the paying of checks primarily pertain to the duties of the agents of the corporation having the immediate management of its business. If defendants were liable in regard to such matters, it was for negligence in the selection or retention of such agents, or for neglect in the control and direction of these agents concerning their duties in such matters. It, therefore, devolved upon complainant to show that defendants had been neglectful in their duty in controlling or supervising these agents, and that this want of due care and attention had resulted in losses to the corporation. The ruling of the Chancellor that the burden was upon complainant not only to prove losses, but to show that such losses were the consequence of the negligence of the directors, was right. One who seeks to recover for negligence must allege and prove it. So he must show that the damage he seeks to recover was the consequence of this negligence. *Bruce v. Baxter*, 7 Lea, 477.

Complainant's first assignment of error must be overruled. The only remaining assignment of error by complainant is the third, which is that it was error in the Chancellor to refuse a reference as to certain losses resulting from overchecks by O. P. Bruce & Co., F. J. Gray & Co., and Caldwell & Kelso. As to the overchecks of Bruce & Co., and F. J. Gray & Co., it is enough to say that they were all made more than six years before this bill was filed, and any liability is barred. The only evidence cited to support the assignment as to the overchecks of Caldwell & Kelso is that of the trustee, Hancock. The witness does not show that this firm was irresponsible when their account was overdrawn. It is not negligence *per se*, in the absence of a by-law or order of a superior officer, for a cashier to pay the overcheck of a responsible customer. Such overchecking is not uncommon, and in practical banking is almost unavoidable. In effect the payment of an overcheck is a loan without security, upon the implied condition that the account shall be made the next day or upon notice. If not responsible negligence in the cashier to pay the overdrafts of responsible customers, it is clearly not a matter for which the directors can be made liable by mere proof that an account was overdrawn and a loss sustained. The assignment is overruled.

We come now to consider the errors assigned by defendants. The first is, that it was error to charge defendants with the notes of W. N. Moore

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and W. T. Ross as discounts improvidently made. The Moore note was taken in 1882 by the president of the bank, in renewal of a balance due upon an old note. The original note, as shown by the fact that the new note was chiefly for past-due interest, was discounted more than six years before bill filed. The negligence, if any, was in discounting the original note, and any cause of action for that matter was barred. The W. T. Ross note was only for twenty-one dollars, and the cashier, Thomas, proves that a claim on Boyer & Blake, who were then regarded as responsible, was taken as collateral security. There was no negligence in this, and the first assignment is sustained.

The sixth assignment is, that it was error to charge defendants with certain small notes barred by limitations. The Master had reported that there was no proof to show any losses sustained by neglect to sue. Upon exception by complainant, the defendants were charged with these notes. The only evidence cited by complainant to support this charge is that of Mr. Hancock, who, in answer to the question as to what assets turned over to him were barred, answered and set out these notes. It is not shown that they were solvent when discounted, or at any other time. It does not follow that they were lost to the bank because barred when they came to the hands of the trustee. Complainant should have gone further and shown that they were solvent assets. The assignment is sustained.

The fourth assignment complains that it was error to charge defendants with the overchecked accounts of McCown Bros., and J. E. Caldwell & Co. The Master had reported in favor of defendants upon these items, but upon complainant's exception they were charged to defendants. The evidence does not show that these firms were irresponsible when their accounts were overdrawn.

The ruling made on complainant's third assignment with reference to the overchecked account of Caldwell & Kelso applies to this, and the fourth assignment of error by defendants is sustained. The remaining assignments relate to the overchecked accounts of the following firms and individuals, all of which were charged to the defendants: W. T. Ross and W. T. Ross & Co., \$1,359.86; R. P. Hairstone, \$328.59; Ship-Miles, \$72.69.

The decided weight of proof with reference to the last two accounts is that while the drawees had little property, yet they were in business and had credit, and were accustomed to pay their debts. As to W. T. Ross, he was not indebted, was a man of character, was a profitable customer to the bank, and had a very large insurance business. The cashier was in the habit of indulging these parties by permitting them to overdraw, they paying interest. While it is probably true that none of these parties had property subject to execution, yet they were people of character and of business integrity demanding and receiving credit. They had often overdrawn and made their accounts

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good. If it were shown that these overchecks were with the consent of defendants, it would not necessarily follow that they were liable upon mere proof that the drawees could not be coerced into payment. We are not to try the responsibility of bank officers or bank directors by the vigorous principles regarding loans by technical trustees or guardians or executors. To lend at all is a breach of trust by some trustees who have no authority to lend. But in this case we are dealing with an institution whose business it is to lend. The law has never undertaken to rigidly define the conditions upon which banks may lend. Among business men there is found a degree of trust and reliance upon moral character, business integrity, and thrift, justifying to a business man the soundness and prudence of a transaction which to judges and lawyers engaged in applying the hard and fast rules of law would seem indefensible and reckless. The standard of diligence and prudence by which bank officers and bank directors should be tried, is that which business men have erected for themselves. Reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required of such officers. Several of the overchecked accounts heretofore disposed of upon other grounds were the accounts of men engaged in buying and shipping produce. One of those now under consideration was that of a man engaged in buying and shipping stock. These accounts were overdrawn upon an agreement that

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drafts drawn against the shipment with bill of lading attached should be turned over to the bank and the account thus made good. Advances were made in this way, and the men thus enabled to carry on their business. In some instances losses finally resulted because of losses sustained by decline of values. In others the fund was misapplied. Without, however, determining the liability of defendants if it had been shown that these accounts were overchecked by permission of defendants, we decide only the case presented. The defendants did not authorize these overdrafts; nor did they have actual knowledge that the accounts were being overdrawn; nor is there any presumption of knowledge from the mere fact that entries upon the books of the bank would have shown that the cashier was permitting overdrafts.

A director in a suit between himself and the corporation, or those suing upon the corporate right of action, is not presumed to have knowledge of all that is shown by the books of the company. The presumption of knowledge attaching to a director which is referred to in the case of *Lane v. Bank*, 9 Heis., 437, applies only in suits between the bank and a stranger. The doctrine has never been extended to suits between the bank and its directors. *Savings Bank of Louisville v. Caperton*, 87 Ky., 323; *Clews v. Borden*, 36 Fed. Rep., 617; *In re Dunham*, 25 Ch. Div., 725.

The doctrine of the *Lane* case is carefully limited in *Martin v. Webb*, 110 U. S., 8.

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Whatever may be said as to the negligence of the directors in office prior to 1880, it is overwhelmingly shown that after that time, and through the entire period covered by the overchecking now under consideration, that there was no inattention to the duties of their office. Meetings were regularly and frequently held, the assets in shape of discounted paper were carefully examined, and directions given as to collections. The cashier was forbidden to allow any overchecking, and he was required to have the approval of at least one director to the discounting of any paper. Vigilant efforts were made to save the bank by closely looking after its assets. It is true that the money in the hands of the cashier was never counted, but as no defalcation or larceny was ever committed, the fact becomes immaterial. After this renewed vigilance and attention there was no such habit or custom of permitting doubtful overchecks as to operate as notice; and under all the circumstances, we do not think defendants chargeable with the items embraced in the assignment of error now being considered.

Reverse the decree of the Chancellor, and dismiss the bill at cost of complainant.

Massadillo v. Railway Company.

MASSADILLO v. RAILWAY COMPANY.

(Nashville. February 14, 1891.)

1. NEW TRIAL. *Excessive verdict. Remittitur.*

Where verdict for plaintiff in an action of tort has been declared by the trial Judge so excessive in amount as to indicate passion or prejudice on the part of the jury, and this Court concurs in that opinion, a new trial will be granted by this Court notwithstanding the trial Judge refused it upon remittitur of the excess, where the plaintiff entered the remittitur at the Court's suggestion, but did so under protest, reserving exception.

2. SAME. *Remittitur under protest invalid.*

Remittitur "under protest" should not be received by the Court, and will be rejected, if entered, in the consideration of the motion for new trial.

FROM WILSON.

Appeal in error from Circuit Court of Wilson County. ROBERT CANTRELL, J.

LILLARD THOMPSON and ED I. GOLLIDAY for Massadillo.

B. J. TARVER and SAMUEL GOLLIDAY for Railway Company.

Massadillo v. Railway Company.

LEA, J. The plaintiff, Massadillo, brought suit against the defendant railroad company for damages for personal injuries. The jury rendered a verdict for plaintiff for \$5,500. The defendant moved the Court for a new trial, assigning several causes as reasons therefor. The Court overruled all the causes except the one which assigned that the verdict was excessive, and stated "that ground was well taken in the judgment of the Court, and the Court would grant a new trial for this cause unless the plaintiff will remit the sum of \$2,500," but "if the plaintiff will remit the sum of \$2,500, the judgment for \$3,000 will be allowed to stand." The "verdict is for too large amount in the opinion of the Court, and the remittitur should be made." Thereupon plaintiff moved the Court for leave to remit \$2,500 "*under protest*, and excepted to the action of the court." And thereupon the plaintiff was allowed to remit said sum "*under protest*" excepting to the ruling and action of the Court, and appealed from so much of his judgment as required him to remit. The defendant appealed, and both have assigned errors.

The action of the Court was erroneous. The action of the Court was virtually compelling the plaintiff to remit. When plaintiff would only remit under protest and objection, the Court should have granted a new trial, being satisfied, as he said, the judgment was excessive. We would not be understood as intimating that the Court might not suggest a remittitur, and if plaintiff accepted it with-

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out protest or objection, then, on application of plaintiff to remit, a new trial might be refused; but a remittitur "under protest and over the objection" of plaintiff should not be entered. If the plaintiff was unwilling to enter a remittitur as suggested by the Court, then he should have declined, and if the Court granted a new trial, might have taken a bill of exceptions, and upon another trial, if dissatisfied with the result, brought the case to this Court for review. We, therefore, hold that the Court erred in receiving the application to remit under protest. Now, the result is that the verdict for \$5,500 remains against the defendant, and with the declaration of the trial Judge, as stated in the bill of exceptions, "that the sum is excessive, and that he would grant a new trial if the plaintiff would not remit." The plaintiff, as we hold, did not remit, and by his action the trial Judge has not exercised his discretion, and we will therefore do what he says he would do if the remittitur was not entered, to wit: Grant the defendant a new trial, as we agree with the Court below that the judgment is excessive, and shows there was passion and prejudice.

The case will be remanded for a new trial, and plaintiff will pay the cost of this Court.

Smith, Adm'r, v. Railway Company.

SMITH, Adm'r, v. RAILWAY COMPANY.

(Nashville. February 17, 1891.)

PAUPER OATH. *Administrator cannot prosecute original suit or appeal upon.*

An administrator cannot, in his representative capacity, either maintain an original suit or prosecute an appeal upon the pauper oath; not even when he avers insolvency of himself personally and also of the estate and next of kin of his intestate.

Cases cited and approved: Green v. Harrison, 3 Sneed, 131; Musgrove v. Lusk, 5 Bax., 684; Gorman v. Flynn, MSS., September Term, 1869; Cargle v. Railway, 7 Lea, 717; Sharer v. Gill, 6 Lea, 495; Johnson v. Hunter, 9 Bax., 185.

Cited and disapproved: Huskey v. Lanning, 8 Bax., 187.

FROM MAURY.

Appeal in error from Circuit Court of Maury County. E. D. PATTERSON, J.

TAYLOR & FOWLER for Smith.

HUGHES & HATCHER for Railway Company.

LURTON, J. This is an action for damages against the Louisville & Nashville Railroad Company for

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injuries resulting in the death of plaintiff's intestate. In lieu of bond plaintiff filed an oath that, owing to his poverty, he was not able to bear the expenses of the suit, and that the estate of his intestate was insolvent, there being no assets with which to bear the expenses of the suit, and that he was entitled to the redress he sought. Upon motion the suit was dismissed for failure to comply with an order requiring bond to be given. The record has been filed for writ of error, the applicant for the writ filing a like pauper oath with the additional statement that the next of kin, for whose benefit the suit is prosecuted, are also unable to bear the expenses of the suit owing to their poverty. The defendant has moved to dismiss the writ of error, because no bond for costs has been executed as required by law. The motion must be allowed.

It has been frequently decided that the right to bring suit *in forma pauperis*, as conferred by the Act of 1821, carried into the Code as §3192, was a right *personal* to the plaintiff, and that a plaintiff suing in a representative capacity could not avail himself of the privilege.

So in *Green v. Harrison*, 3 Sneed, 131, it was held that neither the guardian or next friend of an infant could avail himself of it. Nor can a guardian *ad litem* of an infant (*Musgrove v. Lusk*, 5 Bax., 684); nor a married woman when suing by next friend (*Gorman v. Flynn*, September Term, 1869. Cited by Judge Cooper and approved in

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Cargle v. Railroad Company, 7 Lea, 717); nor can infants prosecute an appeal under such oath (*Sharer v. Gill*, 6 Lea, 495).

In *Johnson v. Hunter*, 9 Bax., 185, it was held that a *qui tam* action could not be prosecuted without bond and security. In this case Judge Deaderick, for the Court, said that "the statutes, and the oath to be taken in prosecutions without giving security, seem to contemplate a provision for the purpose of affording poor persons a means for enforcing their personal rights, or redressing some wrong or injury personal to themselves."

As one-half of the recovery in a *qui tam* action went to the State, it was held not to be such a personal action as contemplated by the statute. By the subsequent Act of 1871, found in revision of (M. & V.) Code, at § 3913, guardians of idiots, lunatics, and persons of unsound mind were permitted to sue upon taking a form of oath therein prescribed. So by Act of 1889, Ch. 105, the next friend of an infant plaintiff is permitted to sue without bond upon taking an oath prescribed by that Act.

These amendatory acts do not extend to suits by administrators, and only strengthen the construction of the Code as conferring a mere personal privilege.

The case of *Huskey, Adm'r, v. Lanning*, 8 Bax., 187, is relied upon by plaintiff as an authority supporting his view of the question. We do not think that that case decides the question now

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under consideration. Judge Deaderick states that the exceptions taken to the oath were that the estate did not appear to be insolvent, and that the oath was taken after term time. These two exceptions are passed upon and overruled. There seems to have been no point made upon the right of the administrator to prosecute the appeal under pauper's oath. The point ought to have been made, but was not. It was therefore not decided. If the reasoning of the Court was sound in the various cases we have cited, holding the statute applicable only to suits in which the plaintiff was suing upon a right personal to himself, then uniformity of decision must require a similar ruling where the action is by the representative of an intestate.

Dismiss the writ with costs.

Cheatham v. Pearce & Ryan.

CHEATHAM v. PEARCE & RYAN.

(*Nashville.* February 17, 1891.)

1. ABATEMENT, PLEA IN. *Verification of by solicitor sufficient.*

Plea in abatement is sufficiently verified by the affidavit of a solicitor in the cause stating that he is "agent and attorney" for the defendant, "and that he is acquainted with the facts set out in said plea, and that they are true in substance and in fact." (*Post*, pp. 676-678.)

Cases cited and approved: *Bank v. Jones*, 1 Swan, 391; *Carter v. Vaulx*, 2 Swan, 641; *Bank v. Anderson*, 3 Sneed, 672; *Carlisle v. Cowan*, 85 Tenn., 170; *Klepper v. Powell*, 6 Heis., 508; *Wrompelmeir v. Moses*, 3 Bax., 470; *Trabue v. Higden*, 4 Cold., 622, 623; *Seifred v. Bank*, 2 Tenn. Ch., 18.

2. SAME. *Amendment of verification allowable.*

Verification of plea in abatement may, by leave of Court, be amended by filing an additional affidavit. (*Post*, p. 681.)

Cases cited and approved: *Wrompelmeir v. Moses*, 3 Bax., 471; *Trabue v. Higden*, 4 Cold., 624; *Seifred v. Bank*, 2 Tenn. Ch., 19.

3. SAME. *Verification of before Notary in another State sufficient.*

Verification of plea in abatement may be made by affidavit before a Notary Public in and for another State. (*Post*, p. 681.)

Case cited and approved: *Carlisle v. Cowan*, 85 Tenn., 170.

4. SAME. *Verification of by one member of firm sufficient.*

Plea in abatement by a firm is sufficiently verified by an affidavit on behalf of the firm which is subscribed and sworn to by one member of the firm. (*Post*, pp. 677, 678.)

Case cited and approved: *Moody v. Alter*, 12 Heis., 142.

5. CHANCERY PLEADING AND PRACTICE. *Plea in abatement construed as a negative plea.*

Plea in abatement in an attachment case denying the truth of the causes for the attachment averred in the bill is nothing more than a negative

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plea, although it contains an affirmative statement of the facts relied upon to support the denial. (*Post*, pp. 674, 675.)

6. SAME. *Answer accompanying plea in abatement.*

Plea in abatement to an original attachment bill should not be accompanied by an answer in support of it, where the bill charges, as ground for the attachment, a single fraudulent disposition of property, without averring any matters of evidence in support of the charge of fraud, and the plea simply denies the fraud, thereby covering the entire bill "so far as the same makes any charges or seeks any relief" against the particular defendant filing the plea. The answer, in such case, would overrule the plea. (*Post*, pp. 678-680, 686.)

Cases cited and approved: Seifred v. Bank, 1 Bax., 203, 204; Graham v. Nelson, 5 Hum., 610; Pigue v. Young, 85 Tenn., 266.

7. SAME. *Same.*

Where complainant waives defendant's oath to answer, it is not incumbent upon the defendant to support his plea by an answer, even in a case where it would otherwise be required. (*Post*, p. 679.)

8. SAME. *Extension of time to take proof. Chancellor may impose terms.*

Where, after the time allowed by law for taking testimony has expired, and the cause has been regularly reached for trial upon call of the docket, the Chancellor grants an extension of time for the taking of further evidence, it is an act of grace and favor to the party obtaining the extension, and he cannot complain of any terms that may be imposed. The Chancellor may require him to take depositions of witnesses resident in county on two days' notice, and of non-resident witnesses, by interrogatories, upon one day's notice. (*Post*, pp. 684, 685.)

9. SAME. *No decree for debt not due, where original attachment fails.*

In suit, by original attachment, for debt not due, no decree will be given for the debt, when the attachment is defeated by plea in abatement, and the prematurity of the suit for the debt is interposed as a defense by answer. (*Post*, p. 687.)

Case cited and approved: Pigue v. Young, 85 Tenn., 268.

10. SAME. *Replication to pleas.*

Replication to plea in abatement is proper, under the practice of the Chancery Courts of this State, even where the plea is purely negative. Replications are abolished only as to answers. (*Post*, pp. 692-696.)

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Code construed: §§ 5065, 5136, 5177 (M. & V.); §§ 4322, 4393, 4432 (T. & S.).

Cases cited and approved: Klepper v. Powell, 6 Heis.; 506, 507; Trabue v. Higden, 4 Cold., 622; Lea v. Vanbiber, 6 Hum., 19.

11. SAME. *Trial by jury. Demand for, when made.*

The demand for a jury to try issues of fact in a Chancery Court may be made, in the absence of any rule of Court regulating that matter, at any time before the cause is heard by the Chancellor. (*Post*, p. 688.)

Cases cited and approved: Allen v. Saulpaw, 6 Lea, 481; Duncan v. King, 1 Tenn., 79; London v. London, 1 Hum., 4; Lowe v. Traynor, 6 Cold., 635; Morris v. Swaney, 7 Heis., 592; Mills v. Farris, 12 Heis., 451; Johnson v. Warden, 1 Leg. R., 26; Pearce v. Suggs & Pettit, 85 Tenn., 728; Cooper & Stockell v. Stockard, 16 Lea, 145.

12. SAME. *Same. Same.*

The recent statutes regulating time and manner of demanding jury trial have no application to the Chancery Courts. (*Post*, pp. 688-691.)

Acts construed: Acts 1875, Ch. 4 (§§ 3602-3605 (M. & V.) Code); Acts 1889, Ch. 220.

Cases cited and approved: Allen v. Saulpaw, 6 Lea, 481; Cooper & Stockell v. Stockard, 16 Lea, 145.

13. SAME. *Same. Chancellor may prescribe reasonable rules regulating demand, etc.*

Chancellors possess inherent power to make reasonable rules with reference to demanding of jury trials and presenting issues therefor in the Chancery Courts. (*Post*, p. 691.)

Cases cited and approved: Stadler v. Hertz, 13 Lea, 318, 319; Denton v. Woods, 86 Tenn., 37; Wood v. Frazier, 86 Tenn., 509.

14. SAME. *Same. Same.*

And a rule is reasonable which requires "that applications for a jury must be made within the first three days of the trial term." (*Post*, pp. 691, 692.)

Case cited and approved: Stadler v. Hertz, 13 Lea, 318, 319.

15. SAME. *Same. Same.*

The demand for jury under this rule must be made in open Court, and

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within the first three days of the term. Demand in a replication on file during the first three days of the term is insufficient. (*Post*, p. 696.)

(See Code, § 5216 (M. & V.)

16. SAME. *Same. Same.*

A rule of Court that requires "the issues of fact in all cases triable by jury" at a particular term to be presented and filed on or before a specified day, and that "each issue submitted shall embrace only one question of fact," is held proper and reasonable. (*Post*, p. 682.)

17. ASSIGNMENTS OF ERROR. *Must show error in action of lower Court.*

Assignments of error must show upon their face that, *prima facie*, the action of the lower Court was erroneous, or state some reason why it is claimed that its action was erroneous. (*Post*, pp. 686-688.)

Cases cited and approved: *Wood v. Frazier*, 86 Tenn., 501-503; *Denton v. Woods*, 86 Tenn., 37.

(See *Bleidorn v. Pilot Mountain Coal & Mining Co.*, *ante*, pp. 206, 207.)

18. SAME. *Variance.*

There was motion in Chancery Court to strike out plea in abatement "filed for Pearce & Ryan because not *signed* by Defendant *Ryan*."

This motion was disallowed. There was assignment of error in this Court that "the Chancellor erred in not striking out the plea in abatement of the firm because it was not signed by the *firm*, Pearce & Ryan, and *sworn to* by Ryan, a member of the firm, but only by Pearce."

Held: The assignment is bad. The Chancellor will not be put in error for not granting a motion that was never made. (*Post*, pp. 677, 678.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
ANDREW ALLISON, Ch.

Cheatham v. Pearce & Ryan.

EAST & FOGG and ED I. GOLLIDAY for Cheatham.

TILLMAN & TILLMAN for Trustee.

DICKINSON & FRAZER for Pearce & Ryan.

ED BAXTER, Sp. J. On July 22, 1889, F. R. Cheatham filed a bill in the Chancery Court at Nashville against C. S. Pearce and Thomas Ryan, partners under the firm name of Pearce & Ryan, and also against C. B. Pearce and C. D. Pearce.

Complainant charged that he was the holder of five promissory notes, aggregating \$4,448.40, executed by Pearce & Ryan; but none of them were due when the bill was filed.

Complainant further charged that the firm of Pearce & Ryan pretended to sell out their stock of goods and property to C. B. Pearce and C. D. Pearce for about \$43,000; that C. B. and C. D. Pearce lived in Kentucky, and were, respectively, the father and brother of the C. S. Pearce who was a member of said firm; that no record of said sale was made; that the terms of the sale were not given out in any way; and that no explanation had been made as to how the \$43,000 had been paid.

Complainant charged that said sale was a false and fraudulent disposition of the property pretended to be sold, and that it was intended to cheat, hinder, and delay the creditors of said firm.

Complainant charged that said firm, and said

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C. B. and C. D. Pearce, were in consultation over the matter before executing said device, and each of them knew that said firm was insolvent, and could not meet its liabilities.

Complainant charged that if the \$43,000 was paid in cash, said firm had it in their possession, and it was liable for the payment of complainant's debts; that if said firm did not have said money in their possession, they had made a false and fraudulent disposition of it; and that if said money had never been paid to said firm, all the property and effects pretended to be sold should be subjected to complainant's debts.

Complainant charged that the property sold was worth \$10,000 or \$15,000 more than the \$43,000 pretended to be paid for it.

The bill prayed that defendants be required to answer, but not under oath, which was expressly waived; that C. B. and C. D. Pearce be enjoined from selling or disposing of any of said property which they had pretended to purchase; that the same, or a sufficiency thereof, be attached; that a receiver be appointed to take charge of said property and sell it; that a judgment be rendered in complainant's favor upon said notes, and for general relief.

Other persons were made defendants, and other matters were stated in the bill; but as it has been dismissed and abandoned as to those persons and matters, they need not be referred to hereafter.

On September 2, 1889, C. S. Pearce and Thomas

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Ryan, composing the firm of Pearce & Ryan, filed a plea in abatement to so much and such parts of the bill as seek to attach their property; and they aver that it is not true that the sale by defendants, Pearce & Ryan, to C. B. and C. D. Pearce, composing the firm of C. D. Pearce & Co., of their stock of goods and fixtures, was a false and fraudulent sale and disposition of their property; or that it was made to cheat, hinder, and delay the creditors of said Pearce & Ryan; or that it was made to cover the property, and prevent the joint creditors of said firm from making their recovery out of the property of said firm; or that the sale was a pretended sale; or that it was a trick, device, and fraud resorted to for any purpose.

The plea denies that the consideration for said sale was not paid to Pearce & Ryan by C. D. Pearce & Co. at the time of their purchase; or that Pearce & Ryan had made a false and fraudulent disposition of said consideration; or that said sale was made with a view to their failure. The plea also denies that said stock of goods was worth more than the price paid to Pearce & Ryan by C. D. Pearce & Co. The plea avers affirmatively that "on July 17, 1889, Pearce & Ryan sold and delivered to C. D. Pearce & Co., in good faith, and at a full and fair price, namely, for the sum of \$43,580.23, all of the goods, wares, and merchandise then belonging to them situated in their store-house on Market Street, Nashville, Tennessee, and including also certificates or warehouse

receipts for 500 barrels of whisky in the warehouse of Charles Nelson, and that on the same day the purchasers paid to them \$43,410.17 of said money by their check, which was afterward, and within two days thereafter, paid to said Pearce & Ryan, and that within a short time thereafter the said purchasers paid the balance of \$170.06 to said Pearce & Ryan; and that upon the day of said sale, to wit, July 17, 1889, all of said property so sold by them was delivered to C. D. Pearce & Co., and that said C. D. Pearce & Co. took possession of them," etc. The plea was sworn to by C. S. Pearce alone. We construe the plea as amounting, in substance, to nothing more than a negative plea, denying that the sale was fraudulent, the affirmative averments contained in the plea being a mere statement of the facts upon which the defendants rely to support the denial.

On the same day Pearce & Ryan filed their answer "to so much of the bill of complaint" as is not covered by their plea filed thereto. On the same day C. B. and C. D. Pearce filed a plea in abatement "to the said bill so far as the same makes any charges or seeks any relief against them." This plea contains substantially the same matters of denial, and the same affirmative matters as are averred in the plea of Pearce & Ryan; and in addition thereto it avers that after the property was delivered to C. B. and C. D. Pearce, they held possession of the same until a portion of it was levied on by the attachment in this cause.

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We place the same construction upon this plea that we have placed upon the plea of Pearce & Ryan. This plea was sworn to on September 2, 1889, by J. M. Dickinson, the affidavit being in the following form: "Mr. Dickinson makes oath that he is agent and attorney for C. B. Pearce and C. D. Pearce, defendants in the foregoing plea, and that he is acquainted with the facts set out in said plea, and that they are true in substance and in fact." This plea was not accompanied by an answer.

On November 15, 1889, complainant moved "to strike from the files the plea purporting to be a plea in abatement filed for Pearce & Ryan, because not *signed* by Defendant *Ryan*, and because it is insufficient." The Chancellor, on November 18, 1889, refused, and overruled the motion. The complainant excepted.

The fifteenth assignment of error by complainant is that "the Chancellor erred in not striking out the plea in abatement of the firm, because it was not signed by the firm Pearce & Ryan, and sworn to by Ryan, a member of the firm, but only by Pearce." The Chancellor was asked to strike out the plea because it was "not signed by *Defendant Ryan*;" but he was *not* asked to strike it out "because it was not signed by the firm Pearce & Ryan." It is one thing for the members of a firm to separately sign their individual names, and quite a different thing to sign the firm name. If complainant intended to insist that the plea ought to

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have been signed in the firm name, he should have made his motion accordingly; and he cannot put the Chancellor in error for not granting a motion that was never made. Neither did complainant ask the Chancellor to strike out the plea because it was not *sworn* to by Ryan; the motion was to strike out the plea because it was not signed by Ryan.

It has been held that an affidavit on behalf of a firm, which was subscribed and sworn to by one member of the firm, was sufficient. *Moody v. Alter*, 12 Heis., 142.

The fifteenth assignment is therefore overruled.

The complainant, on November 15, 1889, moved to strike from the files the plea in abatement of C. B. Pearce and C. D. Pearce, because not sworn to by either one of defendants, but by attorney Dickinson, as agent and attorney, and because it is insufficient in substance and form, and not a proper plea, and is unaccompanied with an answer. The Chancellor, on November 18, 1889, refused, and overruled the motion. The complainant excepted.

The eighth assignment is that "it was erroneous in the Chancellor to permit and allow the plea in abatement filed for C. B. and C. D. Pearce to be sworn to by the solicitor of defendants, and overrule the motion of complainant to strike it out, and compelling complainant to take issue on such a plea, when the gravity of the charge and the nature of the transaction are understood." As we

construe this assignment, it raises two questions. The first question is, Was the plea defective because it was sworn to by no one except Mr. Dickinson, the solicitor for defendants?

It was held in *Bank v. Jones*, 1 Swan, 391, that a plea in abatement may be sworn to by an attorney or agent of the defendant, if the facts constituting the foundation of the plea be within his personal knowledge. See also *Carter v. Vaulx*, 2 Swan, 641; *Bank v. Anderson*, 3 Sneed, 672; *Carlisle v. Cowan*, 1 Pickle, 170; *Klepper v. Powell*, 6 Heis., 508.

In the case last cited it was said that it was not necessary that the fact of agency should be stated in the affidavit, and that the essential requirement is that the truth of the plea shall be verified by some one who is willing to swear that it is true. Mr. Dickinson swears that the facts in the plea are true "in substance and in fact;" which complies with the rule that the affidavit must be positive in form. *Wrompelmeir v. Moses*, 3 Bax., 470; *Trabue v. Higden*, 4 Cold., 622, 623; *Bank v. Jones*, 1 Swan, 392; *Seifred v. Bank*, 2 Tenn. Ch., 18.

He furthermore swears that he is acquainted with the facts. We think that his verification of the plea was sufficient.

The second question raised by the eighth assignment (if a very liberal construction be placed upon it) is, whether the Chancellor erred in disallowing the motion to strike from the files the plea of C.

B. and C. D. Pearce because it "is unaccompanied with an answer."

A plea is said to be "accompanied" by an answer where the bill specially charges fraud, and the plea denying the fraud is supported by an answer which denies the fraud, and also denies the facts charged in the bill as constituting the evidence of the fraud. United States Equity, Rule 32.

In such a case, if the bill calls for an answer under oath, the complainant is entitled to a discovery from the defendant as to the truth of the facts stated in the bill as evidence of the fraud.

A defendant in equity does not give his testimony in his plea, but in his answer; and therefore though the plea, which is a mere mode of defense, denies the fraud, it must be supported by an answer in which the defendant gives his sworn testimony in regard to the facts which the complainant charges will be evidence of the fraud. Tyler's Mitford's Equity Pleading, 331, 335; *Seifred v. Bank*, 1 Baxter, 203, 204; *Graham v. Nelson*, 5 Hum., 610; *Pigue v. Young*, 1 Pickle, 266.

But where, as in this case, the complainant waives the defendant's oath, he thereby manifests his unwillingness to rely upon the defendant's testimony, and therefore the defendant need not support his plea by an answer. 1 Daniel's Chancery Pleading and Practice (3d Am. Ed.), p. 640, note 2.

Where a negative plea is "supported" by an answer, they both necessarily cover the same part of the bill, because the answer furnishes the de-

fendant's testimony in regard to the facts upon which the truth of the plea depends. Tyler's Mitford's Equity Pleading, p. 388.

But a plea is also said to be "accompanied" by an answer when the plea is to one part and the answer is to a different part of the bill. In such a case, if the answer covers any part of the bill covered by the plea, the plea will be overruled. Tyler's Mitford's Equity Pleading, p. 388.

The plea of C. B. and C. D. Pearce is "to the said bill so far as the same makes any charges or seeks any relief against them." It is, so far as they are concerned, a plea to the whole bill; and if they had accompanied the plea with an answer to any part of the bill, their answer would have overruled their plea.

We are of opinion that it was not necessary to "accompany" the plea with an answer, and that the Chancellor did not err in refusing to strike out the plea.

Under the vague and indefinite terms of this assignment, complainant's solicitor might have argued in the Court below that the plea should have been "accompanied" by an answer in "support" of the plea, while in this Court he might have argued that the plea should have been "accompanied" by an answer to some part of the bill supposed to be not covered by the plea. The result might have been that this Court would have reversed the Chancellor upon a point which he had never been called upon to decide. This would be unfair to him.

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It is not enough for an assignment to insist that the Chancellor erred in a certain particular. It must either appear from the face of the assignment that, *prima facie*, the action of the Chancellor was erroneous, or some reason must be stated why it is claimed that the action was erroneous. *Wood v. Frazier*, 2 Pickle, 501-503.

On November 26, 1889, the Chancellor ordered that said C. D. and C. B. Pearce be permitted to make affidavit in their proper persons to said plea; and it was accordingly sworn to before Notaries Public in Kentucky by C. D. Pearce on November 26, 1889, and by C. B. Pearce on December 2, 1889.

It is objected by complainant in the ninth assignment that this action of the Chancellor was erroneous.

In substance the Chancellor permitted the affidavit to be amended, and that an affidavit to a plea in abatement may be amended by leave of Court was held in *Wrompelmair v. Moses*, 3 Baxter, 471; *Trabue v. Higden*, 4 Cold., 624; *Seifred v. Bank*, 2 Tenn. Ch., 19. A plea in abatement need not be verified before the Court where the suit is pending. It may be verified before any officer within this State authorized to administer oaths. *Carlisle v. Cowan*, 1 Pickle, 170. And where the defendants, as in this case, are non-residents, we see no objection to its being verified before any officer of another State who is authorized by the laws of this State to administer oaths in legal proceedings pending in this State.

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We have, however, held that the verification of the plea by Mr. Dickinson was sufficient, and therefore its subsequent verification by C. B. and C. D. Pearce was mere surplusage, and may be disregarded.

The ninth assignment is therefore overruled.

On November 27, 1889, complainant filed a replication to the plea of Pearce & Ryan, in which he says that the plea "is untrue and false in all particulars, and asks and demands that a jury be impaneled in accordance with the law and rules of the Chancery Court to try all the issues of fact raised and involved in the pleadings of the cause." On the same day he filed a similar replication to the plea of C. B. and C. D. Pearce.

On April 10, 1889, more than three months before this suit was commenced, the Chancellor of the Chancery Court at Nashville "made a rule of Court that applications for a jury must be made within the first three days of the trial term."

On April 24, 1890, the Chancellor made another rule of practice that "the issues of fact in all cases triable by jury at this term of the Court, shall be filed on or before the second Monday in May, 1890 (May 12); and each issue submitted shall embrace only one question of fact."

Both of said rules were entered on the minutes of said Court.

The sixteenth assignment is that "the Chancellor erred in making the rule" of April 24, 1890, and also in enforcing it in this case.

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This assignment does not show upon its face that, *prima facie*, the action of the Chancellor was erroneous; nor does it state any reason why it is claimed that it was error for the Chancellor to make the rule, or to enforce it in this case.

Does complainant intend to insist that the Chancellor has no power to make any rules of practice for his Court, or does he intend to insist that he acted unwisely or oppressively in making this particular rule? If the Chancellor had the power to make the rule, why should it not be enforced in this case as well as in any other?

The assignment furnishes us no aid upon any of these questions, and we therefore overrule it. *Wood v. Frazier*, 2 Pickle, 501-503.

The case was regularly called for trial upon the docket of the Chancery Court, on May 27, 1890, "when complainant claimed that, upon the record in the case, he was entitled to a trial by jury of the issues of fact in this cause, and asked that the cause be put on the docket of causes triable by jury; and defendant denied that complainant had this right, on the ground that a demand had not been made for the jury, and entry thereof on the docket as required by law."

The question was taken under advisement by the Chancellor until May 30, 1890, when he decreed that complainant was "not entitled to have the cause tried by a jury, having failed to comply with the requirements of the statutes in that respect." The Chancellor further decreed that the

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cause having been regularly reached on the docket, the defendants were entitled to have it tried at that term, and the time allowed by law to complainant for taking proof having elapsed without complainant having taken any proof, it was ordered that the cause be set for trial on July 2, 1890; that both sides have until June 21, inclusive, to take their evidence in chief, and until June 28, inclusive, to take their evidence in rebuttal; that each party should give to the solicitor of the other two days' notice of the time and place for taking testimony, and the name of witnesses, where the evidence was to be taken in Davidson County; and if any evidence was to be taken out of that county, it was to be taken on interrogatories filed with the Clerk, one day being allowed, after notice to the opposite solicitor that they are filed, for filing cross interrogatories.

The fourteenth assignment is that the Chancellor erred after continuing the case from May 30 to July 2, in ordering that all depositions of non-residents of Davidson County should be taken on interrogatories on one day's notice.

If the Chancellor was right in holding that complainant was not entitled to a trial by jury of the issues of fact, that the time allowed complainant by law for taking testimony had expired without his having taken any, and that the case had been regularly reached for trial on the call of the docket, complainant was entirely at the mercy of the Court, and the permission granted to take

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testimony either in or out of Davidson County, upon interrogatories or otherwise, was an act of grace and favor to him, of which he has no just cause of complaint. We therefore overrule the fourteenth assignment.

On June 27, 1890, complainant filed a petition to rehear and rescind the decree of May 30, 1890, and moved that the case be placed on the jury docket, and for a jury to try the case, and for leave to take depositions, and for hearing of oral testimony, and to set the case for a day, and to open the case for taking proof, etc. The petition for rehearing assigns six causes or reasons why its prayer should be granted.

On June 30, 1890, the Chancellor being of opinion that complainant was not entitled to a trial of the case by jury, under the rules of the Court made April 10, 1889, and April 24, 1890, he having failed entirely to comply with either of said rules, and that he was not entitled to a jury trial under the statutes of the State applicable to trials by jury, so ordered and decreed. He dismissed the petition for rehearing, and ordered that the case stand for trial on July 2, 1890, as theretofore fixed. Complainant excepted.

On July 5, 1890, the Chancellor ordered that as the practice in regard to jury trials was in some confusion, complainant might have an extension of time for one week from that day in which to take proof; but complainant declined to take the week, as being an insufficient time within which to take proof in the case.

The tenth assignment is that "the decree of July 5, 1890, is clearly error in limiting to one week the complainant for his proof."

As stated in acting upon the fourteenth assignment, any extension of time offered to complainant for the purpose of enabling him to take his proof was a favor to him instead of a cause of complaint, provided the Chancellor was correct in other respects in said decree. We therefore overrule the tenth assignment.

On July 2, 1890, an affidavit of complainant's solicitor was filed for a continuance.

On July 11, 1890, complainant moved to be allowed to take proof, and for that purpose to remand the case to the rules, for an order allowing time, and to continue the case to the next term of the Court.

On July 18, 1890, the cause was heard by the Chancellor without a jury, and, it appearing to the Court that all the facts and equities set up in the bill are fully denied in the pleas of abatement and answers, and complainant having failed to sustain his bill by proof, the Court ordered the bill to be dismissed with costs, and declined to render judgment in favor of complainant upon the notes.

The eleventh assignment of error is that "the Chancellor erred, under all the facts set forth, in refusing, on the affidavit (record, 48, 49), to allow the case to go to rules to be prepared." This assignment does not show upon its face that, *prima facie*, the action of the Chancellor was erroneous,

nor does it state any reason why it is claimed that his action was erroneous. It is therefore overruled. * *Wood v. Frazier*, 2 Pickle, 501-503.

On July 18, 1890, complainant filed a petition to rehear, set aside, and modify the decrees entered at that time; to have the case placed on the jury docket, and to be permitted to frame his issues for trial.

On July 21, 1890, the petition was dismissed, and on July 26, 1890, complainant appealed to this Court.

The twelfth assignment is that "the Chancellor erred in overruling the petition to rehear." This assignment is overruled for the reason given in overruling the eleventh assignment.

The thirteenth assignment is that "the Chancellor erred in not extending the time for taking proof in the cause upon the affidavit of the solicitor of complainant." This assignment is overruled for the reason given in overruling the eleventh assignment.

The seventeenth assignment is that "the Chancellor erred in not giving a judgment on the notes in favor of Cheatham." This assignment is overruled for the reason given in overruling the eleventh assignment; and, besides, notes not being due when the bill was filed, and that fact having been pleaded and relied upon in the answer filed by Pearce & Ryan, the suit could only be sustained by sustaining the attachment; and the attachment having been dismissed with the bill, no decree

could have been rendered on the notes. *Pigue v. Young*, 1 Pickle, 268.

The remaining assignments of error fairly raise the question as to whether the Chancellor erred in refusing complainant a trial of the issue of fact in the case by jury. It was held in *Allen v. Saulpaw*, 6 Lea, 481, decided in 1880, that either party to a suit in Chancery is, upon application, entitled to a jury, to try and determine any material fact in dispute; and that the demand for a jury may be made at any time before the case is in fact heard by the Chancellor.

In *Duncan v. King*, 1 Tenn., 79, it was held that issues of fact to be tried by a jury may be ordered at any state of a suit in equity, even after the hearing has commenced; and in the following cases the order for a trial by jury was made after the case had "come on to be heard:" *London v. London*, 1 Hum., 4; *Lowe v. Traynor*, 6 Cold., 635; *Morris v. Swaney*, 7 Heis., 592; *Mills v. Farris*, 12 Heis., 451; *Johnson v. Warden*, 1 Leg. R., 26; *Pearce v. Suggs & Pettit*, 1 Pickle, 728.

But in all of those cases a motion for a jury was made in open Court by one of the parties, or the Chancellor, of his own accord, ordered a trial by jury for his own information.

The decision in *Allen v. Saulpaw* was in effect approved in *Cooper & Stockell v. Stockard*, 16 Lea, 145, decided in 1885.

In each of those cases the decision was by a

full bench, and entirely unanimous. In each of them it was held that the Act of 1875, Chapter 4, page 6, did not apply to the trial of issues of fact in the Chancery Court. After a careful review of the reasoning of Chief Justice Deaderick, who delivered the opinion in *Cooper & Stockell v. Stockard*, we approve the decision made in that case.

The Act of 1875 provides "that hereafter when any civil suit is brought in any of the Courts of record in this State, whether such suit comes to such Court by summons, appeal, certiorari, or otherwise, and which is now triable by jury, either party desiring a jury shall, in case of original suits, demand a jury in his first pleading tendering an issue triable by jury, and in the case of all other suits shall demand a jury within the first three days of the trial term."

This Court having decided in 1880, and again in 1885, that the Act of 1875 did not apply to the trial of issues of fact in the Chancery Court, the Legislature passed an Act, approved April 6, 1889, enacting that the Act of 1875 "be so amended as to provide that hereafter all suits now pending in the Courts of this State, or which may hereafter be brought, either party desiring a trial by jury, shall be entitled to a jury, provided he call for the same on the first day of any term at which the suit stands for trial, and have an entry made on the trial docket that he calls for a jury."

The Act of 1889 makes no mention of Chancery

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Courts by name; and as the Legislature knew that this Court had twice decided that the Act of 1875 did not apply to the trial of issues of fact in the Chancery Court, if the Legislature had intended that the Act of 1889 should apply to such issues, language would have been used in the Act of 1889 which would have placed the matter beyond all doubt.

That the Legislature did not intend that the Act of 1889 should apply to the trial of issues of fact in Chancery is somewhat indicated by the fact that a bill was introduced into the Legislature, which was in session when the case of *Allen v. Saulpaw* was being heard in this Court, the title of which bill was to be "An Act to regulate the practice in the Chancery Courts in regard to the trial of causes by jury." The bill, after passing several readings, was referred to the Judiciary Committee, but failed of final passage.

The Legislature of 1881 having failed or refused to pass a bill which expressly regulated the practice in the Chancery Courts in regard to the trial of causes by jury, we cannot assume that the Legislature intended that the Act of 1889 should affect the practice in the Chancery Courts, when no mention by name is made of those Courts in that Act.

The fact that a bill expressly regulating the practice in Chancery Courts in jury causes had been introduced into the Legislature at the session of 1881, was mentioned in the opinion of this

Court in *Allen v. Saulpaw*, 6 Lea, 481, 482; and the fact was thus made accessible to the Legislature of 1889.

In the case of *Stadler v. Hertz & Co.*, 13 Lea, 318, 319, decided in 1884, it was held that a Chancery Court, without the aid of any legislation, had the inherent power to make and enforce a rule that no jury would thereafter be allowed in that Court, unless the demand therefor should be made on or before the second day of the term, by motion on the motion docket, or at the bar of the Court; and the Legislature may have thought that it was unnecessary to make the Act of 1889 apply to Chancery Courts, inasmuch as those Courts had the inherent power, without legislative aid, to make all reasonable rules and regulations upon the subject.

We conclude upon this point that the act of 1889 does not apply to the trial of issues of fact by juries in the Chancery Court.

We are, however, of opinion that the Chancellor of the Chancery Court at Nashville had the inherent power to make all reasonable rules upon the subject to which the rules of April 10, 1889, and April 24, 1890, relate. *Stadler v. Hertz*, 13 Lea, 318, 319; *Denton v. Woods*, 2 Pickle, 37; *Wood v. Frazier*, 2 Pickle, 509.

The rule of April 10, 1889, requires "that applications for a jury must be made within the first three days of the trial term." We think that the rule is a reasonable one, and that the Chancellor

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had the right to enforce it in this cause. *Stadler v. Hertz*, 13 Lea, 318, 319.

It is conceded that complainant did not comply with this rule unless he did so when he demanded a jury in the replications which he filed to the plea and answer of Pearce & Ryan, and to the plea of C. B. and C. D. Pearce.

He insists, however, that as those replications were on file before the trial term of the Chancery Court convened, and as they remained on file during and after the first three days of said term, they constituted a fair and even literal compliance with the requirement of the rule.

On the other hand, it is insisted by defendants that replications were abolished by the Code; that the replications in this case were superfluous, and, therefore, that neither the Court nor the parties could be compelled to take cognizance of them, or of any demand for a jury that might be contained in them.

Formerly in equity, if the defendant by his plea or answer offered new matter, the complainant replied specially. This *special* replication was followed by rejoinder, surrejoinder, rebutter, surrebutter, etc., as at common law.

Special replications fell into disuse long ago (Tyler's Mitford's Equity Pleading, p. 412), but *general* replications continued in use in this State until the passage of the statute carried into the Code of 1884, at § 5065. *Special* replications to answers were abolished in the United States Cir-

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cuit Courts by Equity Rule 45, but the *general* replication is still retained in those Courts. See Equity Rule 66.

In this State the *general* replication to an answer was long ago regarded as a mere formal acceptance of the issues tendered by the negative averments of the answer, and as a tender of issue upon the affirmative averments of the answer, and being merely formal, the general replication to an answer was usually, in practice, put in by the Clerk and Master. *Lea v. Vanbibber*, 6 Hum., 19.

Section 5065 of the Code of 1884 provides that "no replication or other pleading, *after answer filed*, is required or allowed, but all cases will be heard as if replication had been filed, unless set for hearing expressly *on bill and answer*."

Section 5177 is as follows: "All causes are at issue, without replication filed, if the plaintiff *fail to except to the answer* of the defendant within the time prescribed by law, and shall stand for trial at the first term of the Court *after answer filed*, and at every term thereafter, if not then heard."

We think that the words which we have italicized show that those sections were intended to apply only to cases *where answers are filed*; that their only object was to abolish replications to *answers*, and that they were not intended to abolish replications to *pleas*, especially when the pleas aver new matter.

Section 5136 provides that if the plaintiff (in equity) "thinks the plea good, but not true, he

may *take issue* upon it and proceed to trial;" and the only known mode of taking an issue of fact upon a plea in equity is by replication. 2 Daniel's Chancery Pleading and Practice (3d Am. Ed.), p. 827; Tyler's Mitford's Equity Pleading, p. 390.

In the system of common law pleading, wherever a traverse or denial of fact took place (if it did not involve new matter), it was necessary to tender issue upon the fact denied. Stephens on Pleading (Heard's Ed.), p. 229. And the issue, if well tendered, had to be accepted by a *similitér*. If the plaintiff did not think that the issue was well tendered, he demurred to the traverse. The *similiter* therefore served to indicate that the plaintiff accepted the issue as being well tendered. Stephens on Pleading (Heard's Ed.), pp. 236, 237.

The replication to a negative plea in equity was, necessarily, in substance the same as a *similiter* to a plea of common traverse at common law—*i. e.*, it served to indicate the complainant's acceptance of the issue tendered by the negative plea.

In *Klepper v. Powell*, 6 Heis., 506, 507, the bill, in effect, charged that the defendant was a non-resident; the plea averred that he was not a non-resident. It was said by the Court "that the plea traverses distinctly, and *tenders a denial* of complainant's bill on this subject, and puts him to the proof of his allegations so made." The Court held that the Chancellor in that case erred in holding that the matter of said plea was bad, and that "he should have required the complainant to *take*

issue on the plea." The case was accordingly "remanded for an issue on the plea as tendered." Page 508.

In *Trabue v. Higden*, 4 Cold., 622, an attachment at law was sued out upon the ground that the defendant was about to remove his property from the State, and about to fraudulently dispose of his property. The defendant plead in abatement denying the truth of the affidavit, and the authority of the clerk to issue the attachment. The plaintiff moved to strike out the plea, which the Court below refused to do, and then proceeded to try the case without any issue except such as was presented by the affidavit and the plea denying the truth of it.

This Court held that the verdict without an issue was a nullity, and that after the Circuit Court refused to strike out the plea it was then the duty of the plaintiffs *to reply to the plea either by a direct traverse or by matter in avoidance.* Pages 625, 626.

It is true that the last case was at law, but the Circuit Court in that case was proceeding under its statutory attachment jurisdiction just as the Chancery Court was doing in this case.

We regard the two cases last cited as holding that in attachment cases, whether the proceeding is at law or in equity, if the ground of the attachment is denied by a negative plea, the plaintiff has the right, though it may not be his duty, to signify his acceptance of the issue tendered by the

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plea; and that this acceptance may be signified at law by a similiter, and in equity by a replication in the nature of a similiter, which is the only replication of which a negative plea is susceptible.

We regard the replications filed in this cause as in substance a similiter; and therefore, as this is an attachment case, we regard them as properly filed.

It is proper, however, to say that in the system of common law pleading now in use in this State, the similiter has been rejected as an idle form; the affirmation of a fact by one party and its denial by the other being regarded as forming an issue. History Lawsuit, Sec. 234.

But assuming that the replications were properly filed, the question remains whether a demand for a jury contained in a replication is a sufficient demand according to the rules of chancery practice.

Having held that the Acts of 1875 and 1889 do not apply to the trial of issues of fact by juries in the Chancery Court, we must be controlled by the practice of that Court as it obtains independent of statute. We believe no case can be found in our reports where the Chancellor has ever ordered a jury trial at the application of one of the parties, unless the application was made to the Chancellor by motion in open Court; and a demand for a jury in a replication or other pleading is not a compliance with the practice.

It is true that complainant did apply to the Chancellor in open Court for a jury, but unfortu-

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nately the application was not made "within the first three days of the trial term," as required by the rule of April 10, 1889, and therefore was made too late.

We therefore affirm the decree of the Chancellor.

Complainant will pay the costs of 'this Court and of the Court below.

Owen v. State.

89	696
117	457
117	467

OWEN v. STATE.

(Nashville. March 3, 1891.)

1. CRIMINAL LAW. *Wife not competent witness for husband on trial for crime.*

The wife is not a competent witness for or against her husband in a criminal case.

2. SAME. *Erroneous charge as to reasonable doubt.*

Charge of Court in a criminal case is erroneous, which, in effect, instructs the jury to convict the defendant, if they are *satisfied* of his guilt, without instructing them that the degree of satisfaction required is "certainty beyond reasonable doubt."

3. SAME. *How the doctrine of reasonable doubt should be charged.*

The familiar and well-understood language in which the doctrine of reasonable doubt has been repeatedly expressed by this Court should not be departed from by Judges in charging juries.

Cases cited: *Lawless v. State*, 4 Lea, 180-182; *Railroad v. Gower*, 85 Tenn., 473, 474.

(See *McDonald v. State*, *ante*, p. 161.)

FROM ROBERTSON.

Appeal in error from Circuit Court of Robertson County. A. H. MUNFORD, J.

JOEL B. FORT and S. A. WILSON for Owen.

Owen v. State.

Attorney-general PICKLE and L. T. COBB for State.

SNODGRASS, J. The appeal in error is from a conviction and sentence of fourteen years in the penitentiary for incest.

Errors assigned relate to rejection of defendant's wife as a witness in his favor, and to the charge of the Court.

There was no error in excluding the wife on objection. At common law she could not be a witness for her husband in such case, and we have no statute changing the rule.

The Circuit Judge charged that "the law presumes every defendant to be innocent until his guilt is established beyond a reasonable doubt by proof. In other words, when the State prefers a charge against a citizen, before he can be convicted the burden is upon the State to show by proof to your satisfaction the material elements of the offense charged. If the proof in this case *satisfies* you that at any time previous to the finding of the indictment the defendant, James O. Owen, had carnal knowledge of Mattie Randolph—that is, had sexual intercourse with her—in Robertson County, and that at the time she was the daughter of his wife, the defendant is guilty, and you should convict him; if not, then you should acquit him."

This charge is erroneous. It is not sufficient to say that if the proof shows guilt "to your satisfaction," or "if the proof satisfies you of

defendant's guilt," you must convict. There are degrees of satisfaction, and that which the law requires is "satisfaction beyond a reasonable doubt."

It has been often said by this Court that this well-understood phrase should not be departed from, but if it is, then the full equivalent of the term must be used. In one case it is intimated that "*fully satisfied*" might be equivalent, or a charge that the facts must be "*fully proved*" might fairly imply, the same character of proof, and in the absence of special request for further instruction, a charge in these forms of "*fully satisfied*" or "*fully proved*" might be good. *Lawless v. The State*, 4 Lea, 180-182.

But even this is doubtfully suggested, and Courts admonished to adhere to the ancient and "well-understood" phrase. *Ibid.*, 179, 180.

The preceding general statement quoted from the charge to the effect that "every defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt by proof" does not do away with the imperfection of the charge in reference to how far the jury must be satisfied.

In this case, after making such statement, the Judge explains what he means by it by saying: "In other words, * * * the burden is on the State to show by proof to your satisfaction," and that "if the proof in this case satisfies you, * * * you should convict."

These were stated as definitions of his meaning, or equivalents; and, as such, limited his statement

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to their effect, and thereby made it erroneous. *Railroad Company v. Gower*, 1 Pickle, 473, 474.

It was proper to explain what was meant by them, and the explanation must be correct, or it is of course vitally misleading. It should have been not that the proof "must satisfy you," but that it "must satisfy you *beyond a reasonable doubt*."

This is peculiarly a case in which such instruction should have been clear and accurate. Several witnesses had testified to the fact of the intercourse between defendant and Mattie Randolph. These professed to have stood together in another building thirty or forty feet away and looked through a small aperture in the wall of the building in which they were, and through an open window of the room in which defendant and Mattie Randolph were alleged to be, and to have thus seen the intercourse between them.

The defendant and the girl testified positively that it did not occur. The girl was but nineteen years of age. She swore that neither the defendant nor any one else then or ever had sexual intercourse with her, and offered to submit her person to the examination of physicians in the presence of her mother, to verify the truth of her assertion on this point. This offer was not accepted. The defendant did not ask or the Court make any ruling upon it, and the examination was not made. In the absence of any knowledge, therefore, which such examination might have developed of physical facts sustaining or overturning the

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theory of either party, State or defendant, the case stood upon the opposing testimony and probabilities. The defendant's chance of escape if he were innocent—and of course there was a possibility of innocence—depended upon the most careful and searching consideration of the whole facts and surroundings developed in the evidence, weighed under a charge giving him the full benefit of the law. There were five members of his wife's family—the girl upon whom the offense was alleged to have been committed, a younger girl unmarried, a son, and a married daughter and her husband—the latter, however, living away from their mother's home, but visiting it often.

Every one of them testified to the effect that defendant had acted only as a father to these girls, and that no improper relations had ever been observed between them. It also appeared that they were well-behaved, nice, modest girls, and that defendant was a man of good character. Evidence was introduced too tending to show that defendant was not at home on the twenty-sixth of July, when the State witnesses saw, or thought they saw, the first improprieties in his actions toward the girl, or of hers toward him; for in this instance they testify that she undressed him while drunk, and handled his person improperly, making no statement that he did any thing to her.

In view of all these facts, and the possibility of a great and irreparable mistake involving the ruin of this entire family, and the life of this man—for

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the fourteen years is equivalent to a life sentence—it is the duty of the Court to see that the strictest rules of law be enforced to secure an unobjectionable trial. If upon such his guilt is established to the exclusion of reasonable doubt, then no punishment the law imposes would be more than adequate, for the crime charged is the basest of which human nature is capable. But so long as that question—the one of guilt—remains to be settled, no feeling of abhorrence respecting the crime should obscure the judgment or abate the vigilance of the Court to see that he has the fullest and fairest trial and chance to establish his innocence under the law, which in its best strictness is in its best purity.

For the error indicated in the charge, the judgment must be reversed and the case remanded for a new trial.

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89	704
117	458

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(Nashville. March 3, 1891.)

CRIMINAL LAW. *Erroneous charge as to reasonable doubt. Requests.*

In a criminal case where the Court had instructed the jury rather meagerly and inaccurately upon the subject of reasonable doubt, it was error to refuse to give an additional instruction, at defendant's request, to the effect that "in order to convict the defendant you must find that all the facts necessary to convict are proven to your satisfaction and beyond a reasonable doubt; and if after weighing, considering, and comparing all the testimony, both for the State and defendant, the jury cannot say that they feel an abiding confidence to a moral certainty of the guilt of the defendant, then they have a reasonable doubt, and they should acquit the defendant."

FROM ROBERTSON.

Appeal in error from Circuit Court of Robertson County. A. H. MUNFORD, J.

S. A. WILSON and JOEL B. FORT for Owen.

Attorney-general PICKLE and L. T. COBB for State.

SNODGRASS, J. In this case, which was for a similar offense, and in which the evidence was much the

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same on the part of the State, the Judge charged as follows: "The law presumes every defendant to be innocent until his guilt is established beyond a reasonable doubt by proof. In other words, when the State prefers a charge against a citizen, before he can be convicted the burden of proof is upon the State to show by evidence to your satisfaction the guilt of the accused as charged."

This was error under rule just stated, but the Circuit Judge added: "If the proof satisfies you beyond a reasonable doubt that at any time previous to the finding of this indictment the defendant had carnal knowledge of Helen Randolph in Robertson County, and that at the time of such intercourse she was the daughter of his wife, the defendant is guilty, and you should convict him; if not, you should acquit."

The defendant was not satisfied with this, and asked the Court to charge specially that "in order to convict the defendant you must find that *all the facts* necessary to convict are proven to your satisfaction and beyond a reasonable doubt; and if, after weighing, considering, and comparing all the testimony both for the State and defendant, the jury cannot say that they feel an abiding confidence to a moral certainty of the guilt of defendant, then they have a reasonable doubt, and they should acquit the defendant."

This was the law, and was a proper addition and explanation of the charge given by the Court, and defendant was entitled to have it added as

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written. The Circuit Judge, in his indorsement of this request, submitted to the jury: "This is the law, gentlemen, but when boiled down it simply means that if you are satisfied, from the proof in the case that the defendant is guilty as charged, you should convict; if not, you should acquit."

This is erroneous. The charge was correct as given, and did not need to be "boiled down," because it was itself an elaboration and addition to a former part of the charge because that was not full enough, and this was the defect to be cured; but the meaning given it in the explanation was erroneous. It did not "simply mean" that "if the jury was satisfied from the proof," it should convict. We have already shown that these words are not the equivalent of satisfied beyond a reasonable doubt, in the other case against defendant, and that it was error to so charge. See that case and authority there cited as to propositions determined in this.

For this error the judgment must be reversed and case remanded for a new trial.

IRON COMPANIES v. PACE.

(Nashville. March 3, 1891.)

1. TAXATION. *Method of revision and correction of assessments of back taxes upon appeal or complaint of tax-payer. Not repealed.*

The method provided by Acts of 1879, Ch. 79, for revision and correction of assessments of back taxes upon the appeal or complaint of the tax-payer is not repealed expressly nor by implication by the general Assessment Act of 1887, or by any other Act of a prior date;* and therefore assessments of back taxes made under the provisions of the general Assessment Act of 1887 are subject to correction and revision in the manner provided by said Act of 1879, Ch. 79.

Acts construed: Acts of 1887, Ch. 2, Sec. 24;† Acts of 1885, Ch. 1, Sec. 25; Acts of 1883, Ch. 105, Sec. 25; Acts of 1881, Ch. 171, Sec. 25.

Acts cited as amendatory of Acts of 1879, Ch. 79: Acts of 1883, Ch. 181; Acts of 1885, Ch. 23.

Case cited and approved: Shelby County v. Railroad, 16 Lea, 401.

2. SAME. *Same. Act of 1879, Ch. 79, applies to all back taxes.*

Although the Act of 1879, Ch. 79, applies, in terms, to assessments upon property *wholly omitted* from the original assessment, still the effect of subsequent legislation has been to extend the benefit of its provisions to tax-payers whose property has been re-assessed upon the ground that it was originally assessed upon an *inadequate valuation*.

Acts construed: Acts of 1879, Ch. 79; Acts of 1883, Ch. 181; Acts of 1885, Ch. 23.

* The general Assessment Act of 1889 (Acts of 1889, Ch. 96) does not repeal the Act of 1879, Ch. 79. (See Acts of 1889, Ch. 96, Sections 26, 86.)—REPORTER.

† Repealed expressly by Acts of 1889, Ch. 96, Sections 26, 86.—REPORTER.

NOTE.—Back tax collectors have no power, since the passage of the Act of 1887, Ch. 2, Sec. 24, which is substantially re-enacted by Acts of 1889, Ch. 96, Sec. 26, to assess back taxes. *State v. Building and Loan Associations*, Nashville, December Term, 1890 (oral opinion).—REPORTER.

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Cases cited: Franklin County v. Railroad, 12 Lea, 530, 531; State v. Railroad, 14 Lea, 58; Railroad v. Lauderdale County, 16 Lea, 691.

3. SAME. *Same. Limitation upon correction of back assessments on appeal.*

In case the tax-payer "disputes both the assessment, as to amount, and the right to tax his property," he is required by the Act of 1879, Ch. 79, not only to prosecute and perfect his appeal to the Judge or Chairman of the County Court within ten days after the original assessment is made, but he must have the re-assessment completed within that period, or the Court loses all power to make any re-assessment.

Acts construed: Acts of 1879, Ch. 79, Sec. 3.

Case cited and approved: Tomlinson v. Board of Equalization, 88 Tenn., 1.

4. SAME. *Mandamus not allowed to compel re-assessment after expiration of ten days.*

And therefore the Judge or Chairman of the County Court will not be compelled by *mandamus* to make re-assessment, in such case, after the expiration of ten days from date of the original assessment, although the appeal has been perfected within that period.

Cases cited and approved: Gillespie v. Wood, 4 Hum., 437; Johnson v. Lucas, 11 Hum., 306; Memphis Publishing Company v. Pike, 9 Heis., 704.

5. SAME. *Same. Case in judgment.*

- Pursuant to Section 24, Ch. 2, Acts of 1887, Pace, Trustee, etc., assessed complainants for the years 1886, 1887, and 1888 upon omitted property, and for the year 1887 also upon property assessed originally at an inadequate valuation. Complainants, contesting both the valuation and the liability to taxes, appealed these assessments to the County Judge, as provided by Acts of 1879, Ch. 79. They perfected this appeal within ten days from date of original assessment, but continued the case before the County Judge beyond that period without obtaining re-assessment. After the expiration of the ten days, the County Judge dismissed the case for want of jurisdiction to make a re-assessment. Complainants seek, by *mandamus*, to compel a re-assessment by the County Judge.

Held: That the appeal lies, but that it must have been perfected and re-assessment made within ten days after the making of the original assessment, and that the County Judge lost all jurisdiction over the

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matter after the expiration of ten days, and could not therefore be compelled by *mandamus* to make a re-assessment after that date.

FROM HICKMAN.

Appeal from Chancery Court of Hickman County.
A. J. ABERNATHY, Chancellor.

EAST & FOGG and W. P. CLARK for Iron Companies.

Attorney-general PICKLE, District Attorney-general J. L. JONES, J. B. DANIEL, and J. A. BATES for State.

CALDWELL, J. These are consolidated injunction and *mandamus* bills.

The Warner Iron Company and the Ætna Iron Company were Tennessee corporations engaged in the manufacture of iron, charcoal, and alcohol in Hickman County. June 29, 1889, J. N. Pace, Trustee of that county back assessed the two companies for the years 1886, 1887, and 1888, under Section 24, Chapter 2, of Acts of 1887. Being dissatisfied with the assessments, both companies appealed to the Chairman of the County Court on the sixth day of July following, and on the same

day obtained a continuance until the eighth of July. On the latter day they obtained a further continuance until the thirtieth of the same month, when the Chairman dismissed the appeals on the ground that he *then* had no jurisdiction to revise the action of the Trustee. Appeals were prayed and granted to the Circuit Court, where they are still pending.

After the dismissals by the Chairman and the appeals to the Circuit Court, each of the companies filed a bill in the Chancery Court against the Trustee, Chairman, and others denying its liability for the taxes assessed against it, disputing the valuation of its property, alleging the want of proper notice of the Trustee's intention to make the assessments, and that the Chairman had erroneously dismissed its appeal, and praying for injunction to restrain collection of the taxes assessed, and for *mandamus* to compel the Chairman to revise and correct the assessments. Demurrers being overruled, the bills were answered and proof taken. On final hearing the two causes were consolidated, and the relief sought was granted. Defendants appealed.

Many questions were raised in the pleadings and have been debated at the bar which are not material in the view we have taken, and, therefore, need not be further alluded to in this opinion.

We first consider the contention of defendants that there was no statute in 1889 authorizing an appeal to the Chairman of the County Court; that he, therefore, had no jurisdiction, at any time,

over the assessments in question, and was not required or permitted by law to revise the same, as complainants seek to compel him to do.

The Act of 1879, Chapter 79, constitutes all tax-collectors Assessors, and confers upon them the power and devolves upon them the duty of assessing all taxable property, "which, by mistake of law or fact, has not been assessed." After conferring this power and imposing this duty, the first section of the act further provides that if the owner admits the liability of his property to taxation, but disputes the amount of the assessment, he may have a re-valuation at any time within one month, before the Chairman of the County Court, whose decision "shall be final." The second section provides that where the owner denies that his property is taxable, but makes no complaint of the valuation, the "collector shall submit the facts to the Comptroller as to the State tax, to the Judge or Chairman of the County Court as to the county tax, and to the Mayor of the city or town as to the municipal corporation taxes; and if by these several officers, or any one of them, he is directed to proceed to the collection of the taxes, he shall immediately and without delay obtain from any Justice of the Peace of his county a warrant, or warrants, for said taxes, and which shall be served on the owner of said property, and set for trial before some Justice of the Peace in said county, and warrants may be for the State, county, and municipal corporation taxes jointly or separately; and all

Justices of the Peace are hereby given jurisdiction to try all such cases, no matter what the amount, and the same shall be tried without delay, with the right to appeal to either party to the Circuit Court, and the appeal shall go to the next succeeding term unless the Court is in session to which the appeal is taken, and in that case the appeal shall be to the term being held, and shall be entered and tried at that term." The third section is as follows: "That in case the owner of the property disputes both the assessment as to amount and the right to tax his property, then he shall be allowed ten days to have a re-assessment before the Judge or Chairman of the County Court, and at the end of the ten days the tax-collector shall proceed as, under the second section."

The assessments complained of in the present cases come within the *third* section, because both *the right to assess* at all and *the valuation* of the property are disputed; and by it the right of appeal to the Judge or Chairman of the County Court, for a re-assessment, is expressly given, though the word appeal is not used.

This Act, however, confers power to assess for the current year only, and does not authorize the tax-collector to assess and collect taxes for years anterior to that for which he has been elected and qualified. *Otis v. Boyd*, 8 Lea, 679; 11 Lea, 51; 12 Lea, 527; 14 Lea, 58, 59; 16 Lea, 42.

To meet this infirmity, the first section was amended by the Act of 1883, Chapter 181, so as

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to include all omissions, whether "for the particular year for which the collector is acting or for any previous year or years." And by the Act of 1885, Chapter 23, the period for which the back assessments might be made, and should be made, was limited to "three years."

These amendatory Acts do not take away the right of appeal given by the Act of 1879; nor does the subsequent Act of 1887, Chapter 2, have that effect. Section 84 of the last named Act repeals certain specified Acts, and all other Acts and parts of Acts in conflict with the provisions of that Act; but the Act of 1879, Chapter 79, is not among the Acts specifically named, nor are its provisions for appeal to and revision by the Chairman or Judge of the County Court superseded by or in conflict with any part of the Act of 1887, Chapter 2. The twenty-fourth section of the latter Act, which defines the duty and prescribes the mode of making back assessments, and which it is insisted repeals the Act of 1879, does not embrace or relate to the question of appeal for reassessment in any way whatever; hence, it cannot be held to operate as a repeal by implication. The language of that section is as follows: "That should it at any time after the assessments have been made, come to the knowledge of the Chairman or Judge of the County Court, the Clerk of the County Court, the County Trustee, Sheriff, or other officer or person of any County in this State, that any person, company, firm, or corporation in

said county has not been assessed as contemplated by the provisions of this Act, or has been assessed on an inadequate amount, it shall be the duty of said Chairman or Judge, Clerk, Trustee, Sheriff, or other officer or person, on motion of the Attorney-general, to cite said person, company, firm, or corporation, their agent, attorney, or representative, to appear before the Trustee for the purpose of being assessed according to law; and said Trustee is hereby authorized and empowered to make the proper assessment against such person, firm, or corporation; and should it appear that said person, company, firm, or corporation did, in any manner, connive at or purposely evade said assessment, or did knowingly permit an inadequate assessment to be made, said Trustee shall correct said assessment, and shall add fifty per cent. to the amount of said assessment, and cause the same to be entered upon the tax-books for collection. And the Attorney-general shall be allowed, as compensation for his services, twenty per cent. of the taxes or penalty realized from said increased assessment, to be retained out of the taxes when collected." Acts of 1887, Chapter 2, Section 24.

The enactment of this section was no more a repeal of the right of appeal and revision, given by the Act of 1879, Chapter 79, than was that of Section 25 of the Act of 1881, Chapter 171; or of Section 25 of the Act of 1883, Chapter 105; or of Section 25 of the Act of 1885, Chapter 1; all of which sections of the last three Acts, like that

just quoted, provided for the back assessment of any "person, company, firm, or corporation," not assessed "as contemplated by the provisions of this Act," or "assessed on an inadequate amount."

That said Acts of 1881 and 1883 were not by the Legislature understood as repealing the Act of 1879, is evident from the fact that it was recognized as still in force by the Act of 1883, Chapter 181, which amended and enlarged its scope. Similar evidence of the continuing vitality of the Act of 1879 is found in the legislation of 1885, whereby it was again amended. Acts 1885, Chapter 23.

It was held by this Court, in 1886, that the Act of 1879, as amended by said Acts of 1883 and 1885, was *then* in full force, and that it authorized an appeal to the Chairman of the County Court from back assessments made thereunder. *Shelby County v. Mississippi & Tennessee Railroad Company*, 16 Lea, 401.

Then, by adjudication and by legislative recognition, it is shown that the Act of 1879, as amended, was in force, and the right of appeal and revision thereunder in existence up to the passage of the Act of 1887, Chapter 2; and by a consideration of the latter Act, in its language, scope, and purpose, the conclusion that it does not repeal such right, either expressly or by implication, becomes irresistible.

Hence, we hold that the right to have a reassessment by the Chairman of the County Court, as provided by the Act of 1879, did exist in 1889,

when the back assessments here complained of were made, and when the same were taken before him by appeal.

But whether that right existed as to all these assessments is a more difficult question. The Act of 1879 related alone to *omitted* property, and did not authorize the re-assessment of property which had been *inadequately* assessed. *Franklin County v. Railroad*, 12 Lea, 530, 531; 14 Lea, 58; 16 Lea, 691.

In the cases before us the complainants were back-assessed, under the Act of 1887, Chapter 2, Section 24, on *omitted* property for all the years, 1886, 1887, and 1888; and on *inadequately assessed* property for the year 1887 alone.

So that the right of appeal and revision conferred by the Act of 1879 would, by the terms of the Act, apply only to a part of these assessments—those for *omitted* property, and not those for *inadequately* assessed property. In none of the Acts do we find any provision for a re-valuation or re-assessment by the Chairman of the County Court of property which has been, or shall be, back-assessed on account of an assessment thereof on an *inadequate valuation* in the first instance. No such provision was made in the Revenue Act of 1881, Chapter 171; or of 1883, Chapter 105; or of 1885, Chapter 1; or of 1887, Chapter 2. The twenty-fifth sections of the first three of these Acts, and the twenty-fourth section of the last one, make ample provision for the back assessment of *inadequately assessed* as well as *omitted* property, but all

of them are silent as to the revision of the back assessment made in either case.

Nor do the Acts of 1883, Chapter 181, and of 1885, Chapter 23, amendatory of the Act of 1879, provide for an appeal and revision in case of back assessment of *inadequately assessed* property; they, like the Act they amend, relate by their terms to taxation of *omitted* property only.

Nevertheless, in view of the general course of legislation on the subject of taxation, and the increased scope of back assessments by the general Revenue Acts since the passage of the Act of 1879, we think the right of appeal and revision provided by that Act may well be extended to all such back assessments as are here involved. The Legislature has manifested a purpose, for a series of years, to give the tax-payer who feels himself aggrieved, a fair opportunity to have all mistakes in the assessment of his property corrected, and to this end two systems of correction have been established. As to errors in the general assessment he is given the right of a hearing before the "Board of Equalization," which sits two weeks (Acts 1881, Chapter 171, Sections 36, 37; 1883, Chapter 105, Sections 36, 37; 1885, Chapter 1, Sections 36, 37; 1887, Chapter 2, Sections 41, 42); and as to errors in back assessments, which are generally made after that board ceases to exist, a remedy is provided by the Act of 1879, Chapter 79. At the next session of the Legislature after the passage of this Act, which related alone to

omitted property, the scope of back assessments was enlarged, and provision was made for the re-assessment of property which had been assessed at an *inadequate amount*; and a similar provision has been re-enacted by each Legislature since that time. Acts 1881, Chapter 171, Section 25; 1883, Chapter 105, Section 25; 1885, Chapter 1, Section 25; 1887, Chapter 2, Section 24.

There being already a provision for appeal to the Chairman of the County Court for the correction of mistakes in the back assessment of *omitted* property, it was not indispensable, in the extension of its benefits to those whose property might be re-assessed because *inadequately assessed* in the first instance, that there should be a formal re-enactment of that provision. When the power of back assessing was enlarged by subsequent Acts, the remedy afforded by the Act of 1879 for the revision of back assessments was correspondingly enlarged by necessary intendment. It can hardly be supposed that the Legislature ever intended to give the right of appeal from a back assessment to a tax-payer whose property had not been assessed at all in the first instance, and to deny the same right to the tax-payer whose property had been assessed at an inadequate amount in the general assessment.

Therefore, we hold that the complainants had the right of appeal to the Chairman of the County Court from all the assessments complained of in these bills, whether made on property *omitted* from

the general assessment of property in the county, or on property which had been assessed at an *inadequate* valuation.

The right of appeal and revision, either by the Board of Equalization or the Judge or Chairman of the County Court, is expressly denied in some cases; as, for instance, where a fiduciary neglects or refuses to furnish a schedule of property held by him in trust, so that an assessment may be made, it is provided that the Chairman of the County Court shall assess such property from the best information obtainable, and that his assessment, when made, shall be *conclusive*. Acts 1885, Chapter 1, Sections 34, 35; 1887, Chapter 2, Sections 34, 35.

But this is a different provision from that under which the property in these cases was back assessed; and the fact that the right of revision is expressly excluded in the one instance and not mentioned in the other justifies the inference that it was not intended to be cut off or denied in the latter.

The next question we consider is as to the time within which the appeals should have been prosecuted and re-assessments made. The words of the statute are as follows: "That in case the owner of the property disputes both the assessment as to amount and the right to tax his property, then *he shall be allowed ten days to have a re-assessment* before the Judge or Chairman of the County Court, and *at the end of ten days the tax-collector shall proceed* as under the second section." Act 1879, Chapter 79, Section 3.

Clearly the re-assessment must be made, if made at all, in *ten days* after the back assessment. That is the limit of time *allowed* the complaining tax-payer in which to have any supposed errors corrected. This limit is mentioned twice in the short section. That the correction must be made in ten days is emphasized by the positive direction that "at the end of ten days the tax-collector shall proceed" to sue out a warrant for the collection of the taxes. Whether this is a sufficient time in all cases is not a question for us to determine. It is all that the Legislature has allowed, and the Courts can allow no more. Like the Board of Equalization, he, in this matter, is a special tribunal of limited duration, and at the end of the time mentioned in the statute his powers cease and determine. *Tomlinson v. Board of Equalization*, 4 Pickle, 1.

The action of the Chairman in dismissing the appeals of these complainants and refusing a re-valuation and re-assessment, when they had failed, for thirty-one days after the back assessments were made, to point out the grounds of their complaint and furnish proof to sustain them, was correct. He had no power to make any changes or corrections after ten days from the date of the back assessments. Of this result complainants have no just ground to complain. They knew, or should have known, the law; yet they did not even appeal from the action of the Trustee and present the papers to the Chairman for seven days; and

then on their own motion two continuances were granted. They never did present *data* and proof for the correction of any errors, or ask the present action of the Chairman on the same; though he was ready, as he says, to perform his duty with respect thereto at any time within the prescribed ten days, and would have done so if requested or furnished with proper evidence.

The Chairman had no power to revise these assessments after the expiration of ten days from the time they were made; when that period of time elapsed his jurisdiction ceased, and he could not lawfully have done what the complainants here seek to compel him to do. Therefore, it is too manifest for debate that *mandamus* will not lie. When the writ was applied for, no duty to make the desired re-assessments rested upon the Chairman, and he was utterly without power to take any lawful action with respect thereto. It would be unreasonable for the Chancellor to undertake by *mandamus* to compel him to do a thing which it was not at the time his duty to do, and which, when done, could have no legal efficacy. Jurisdiction which has terminated by lapse of time, or otherwise, can no more be revived by *mandamus* than it can be conferred by that means in the first instance.

To justify the issuance of this writ to compel the performance of a particular act, it must be made to appear not only that performance has been demanded and refused, but also, and primarily,

that the duty is specially enjoined upon the defendant by the positive requirement of the law. 14 Am. & Eng. Ency. of Law, 99, 105, 106; 139, 140; High's Extraordinary Legal Remedies, Secs. 7, 9, 13, 14, 32, 37, 41; Moses on Mandamus, 19, 58, 204; 4 Hum., 437; 11 Hum., 306; 9 Heis., 704; History of a Lawsuit (Martin's Ed.), Sec. 514; 3 Meigs Dig. (Milliken's Ed.), Sec. 1951.

With respect to the merits of the assessments complained of we make no decision, but merely suggest that any errors which may have been committed by the Trustee were probably the unavoidable result of manifest evasions on the part of complainants, for which he might well have added the statutory penalty of fifty per cent., but generously omitted to do so.

Reverse the decree, dissolve the injunctions, and dismiss the bills at the cost of complainants.

DURHAM v. STATE.

(Nashville. March 4, 1891.)

1. CRIMINAL LAW. *Imprisonment at hard labor as punishment for misdemeanor proper.*

Judges of Courts of criminal jurisdiction have the power to impose sentence of imprisonment *at hard labor* in the county work-house as punishment for a misdemeanor. This power is conferred by § 6259 (M. & V.) Code, which reads as follows: "In all cases where a person is, by law, liable to be imprisoned in the county jail for safe-keeping or punishment, confinement in the work-house, if one be provided, may, in the discretion of the Court or Justice, be substituted."

Code construed: § 6259 (M. & V.); § 5413 (T. & S.).

Cases cited and approved: *Eaton v. State*, 15 Lea, 200; *Atchison v. State*, 13 Lea, 275; *Wickham v. State*, 7 Cold., 526.

Question reserved: Is this statute valid so far as it authorizes confinement *at hard labor* of persons held only for safe-keeping.

2. SAME. *Same. Constitutional.*

Statute authorizing Judges of Courts of criminal jurisdiction to punish misdemeanor convicts by imprisonment *at hard labor* in the county work-house does not violate that clause of the Constitution which provides that no one shall be "deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land."

Constitution construed: Art. I., Sec. 8.

3. SAME. *Code, § 6259 (M. & V.) is not repealed by work-house law of 1875.*

So far as § 6259 (M. & V.) Code empowers Judges of Criminal Courts to imprison *at hard labor* in the county work-house as punishment for a misdemeanor, it is not repealed by the work-house law of 1875. The latter statute provides for imprisonment *at hard labor* for *fine and costs only*, and is not therefore inconsistent with the former law. It does not, in terms, repeal the former law, and does not purport to be and is not in fact a revision of the laws upon that subject.

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Code construed: §§ 6259, 6264 *et al.* (M. & V.); § 5413 (T. & S.).

(Acts 1875, Ch. 83.)

Cases cited and approved: *Frazier v. Railroad*, 88 Tenn., 140; 11 Wall., 88.

FROM SUMNER.

Appeal in error from the Circuit Court of Sumner County. A. H. MUNFORD, J.

J. J. TURNER for Durham.

Attorney-general PICKLE for State.

LURTON, J. Durham, under an indictment for murder, was convicted of an assault and battery. Judgment was thereupon entered on this verdict that he be confined in the county work-house at hard labor for three months, and that he pay a fine of fifty dollars and cost of prosecution. The fine and costs were at once secured, and execution ordered to issue for same. A transcript of the record, together with a petition for writ of error and supersedeas, was presented to a member of this Court, who ordered writs to issue as prayed for. It is now insisted that the Circuit Judge had no power to impose a sentence of imprisonment with hard labor under this verdict, and that, having secured the fine and costs, the petitioner

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is entitled to be discharged. The conviction is for a misdemeanor at common law, and the power of the Circuit Judge to punish by a fine not exceeding fifty dollars, where the fine is not fixed by the jury, and by imprisonment in the county jail not exceeding one year is not denied. *Wickham v. State*, 7 Cold., 526; *Atchison v. State*, 13 Lea, 275.

But it is very earnestly urged that hard labor cannot be imposed as a part of such sentence. By § 6259 M. & V. edition of Code, it is enacted that: "In all cases where a person is, by law, liable to be imprisoned in the county jail for safe-keeping or punishment, confinement in the work-house, if one be provided, may, in the discretion of the Court or Justice, be substituted."

A sentence to the work-house is a sentence to hard labor, whether expressly pronounced or not. It is conceded that if this provision of the Code is a valid and an existing law, that the judgment in this case was valid.

The first contention is that this law has, by implication, been repealed by an Act passed in 1875, and entitled "An Act to require persons convicted of misdemeanors to work out the cost of conviction."

First, it is said that the provision of the first section, providing that persons convicted of a misdemeanor "shall be confined in the county work-house after the term of his or her imprisonment, if any, has expired, until he work out his

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fine and cost," is equivalent to saying that such person is not to be so confined therein for punishment or during his term of imprisonment, but *only after* his term has expired. This construction is too narrow, and leaves out of view the general scope and purpose of the law as indicated by the preceding and subsequent parts of the same section. What was the evil to be remedied? By §§ 5271 and 5272, and the Act of 1859-60 amending those sections, a person convicted of a misdemeanor whose term of imprisonment had expired could obtain his release, though he had not paid the cost of his prosecution or the fine imposed, by taking an oath of insolvency. Now, the first section of this Act repeals the former legislation by which such misdemeanants had been enabled to avoid the payment of fine and costs, and in the same sentence enacts that he shall be confined in the county work-house "after the term of his or her imprisonment, if any, has expired until he work out his fine and costs." It is clear therefore that this language is not a prohibition upon confinement for punishment, but a prohibition upon any discharge, although the imprisonment has expired, "until he has worked out his fine and costs." The section giving power to confine for punishment in the work-house in lieu of the county jail, is not referred to in this section, or any other of the Act of 1875, and the subject of confinement for punishment is nowhere in the Act alluded to. The whole scope and purpose of the

Act was to prevent the release and discharge of misdemeanants until they had paid such fine and costs as had been imposed. This subject is the only one indicated by the title, and the provisions of the Act concerning the establishment and regulation of work-houses are germane to the subject indicated by the title.

It is next urged that this section is a provision found in the article of the Code of 1858 concerning "houses of correction," and that inasmuch as the Act of 1875 deals with the same subject by providing for such places of detention, and for the regulation of inmates, that therefore the later legislation operates to repeal by implication, not only the provisions of the old law concerning the establishment of such work-houses and their management, but also to repeal such parts of the old statute as defined the persons who should be subject to confinement therein, and that we must look alone to the later Act to see under what circumstances and for what purposes confinement may be imposed in such institutions. We have already seen that the new legislation does not, *in terms*, repeal any of the sections constituting the old article on work-houses. Neither does it profess to be a *revision* of the legislation on that or any other subject, and contains no clause repealing legislation in conflict.

The reasoning upon which repeals by implication is rested is well stated in the very late work of Mr. Sutherland on Statutory Construction, as fol-

lows: "An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier Act. In such case the later law prevails as the last expression of the legislative will; therefore the former law is constructively repealed, since it cannot be supposed that the law-making power intends to enforce laws which are contradictions. The repugnancy being ascertained; the later Act or provision in date or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it." Sec. 138.

But by a very familiar and universal rule, repeals by implication are not favored. The repugnancy between two statutes must be very plain and incapable of reconciliation. *Frazier v. Railroad*, 88 Tenn., 140.

How far is the Act of 1875 repugnant to or inconsistent with the provisions of Article IV. of Chapter 7, relating to the safe-keeping of criminals? A comparison of the two Acts will demonstrate that the later Act does not cover or embrace *all* of the provisions covered by the old law. The titles, to begin with, are by no means identical. Under the article in the Code several subjects are embraced which might well have been the subject of separate articles or Acts.

First.—The article empowers County Courts and municipal corporations to buy lands, and erect buildings thereon proper and necessary for a work-

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house; and authority is given to appoint persons to manage such houses, and to make rules for the government of the inmates.

Second.—Punishment in excess of hard labor is expressly forbidden.

Third.—The article provides that when an inmate is confined for safe-keeping only, that his earnings should be paid over to him upon his discharge; but that if confined for punishment, his earnings should go to the county, unless he have wife or children, in which case one-half should be paid over to such wife or children.

Up to this point the legislation of the Act of 1875 may fairly be said to cover and embrace the legislation in this article. The article, in some particulars, was vague and defective in those provisions relating to the ascertainment of the inmate's earnings when he had a wife and children, and in not plainly prescribing who was to pay one-half of the earnings of such an inmate to his wife or children. This defect was, however, probably remedied by the provision authorizing County Courts to make regulations concerning the management of the inmates.

But the Code did not stop with providing for the establishment and regulation of such work-houses. It went much further, and defined the classes of persons who might be confined therein. These provisions were for the detention therein: (1) Of vagrants required to find sureties for good behavior; (2) of persons liable to confinement in

the county jail for safe-keeping only; (3) of persons liable to be confined in the county jail for punishment.

The Act of 1875 adds to these classes persons sentenced to pay fine and costs, such confinement to last until fine and costs had been worked out.

As to the confinement of the three classes subject by the Code article to detention in the workhouse, the Act of 1875 is silent. It did not therefore cover or embrace *all* of the provisions of the old law, and, under the well-settled rules of construction concerning repeals by implication, the provisions of the old Act not covered by the provisions of the later Act, are unaffected and still in force. Although there may be two Acts upon the same subject, yet the rule is to give effect to both if possible. When, however, the later Act covers *all* of the provisions of the older Act, and embraces new provisions plainly showing that it was intended to substitute the new system or regulations for the older, then it will operate as a repeal of the former. This is the full extent of the doctrine as stated by Judge Field in the case of *United States v. Tynen*, 11 Wall., 88. The rule as stated by Mr. Sutherland is: "When a new law covers the whole subject-matter of an old one, adds new offenses and prescribes different penalties for those enumerated in the old law, then such former law is repealed by implication." To this he adds that "the effect would probably be that of revision and repeal, though no new offenses

were added; it is enough that the new statute embraces all the provisions of previous statutes on the same subject which are intended to have force." Sutherland Stat. Con., Sec. 143.

The later Act does not cover all of the provisions of the older law, and the very important provisions of the old Act concerning the persons liable to confinement therein are still in force and unaffected by the new legislation. As an illustration of the conservatism of this Court in declaring repeals by implication, the case of *Cate v. The State* is in point. It also is an important instance of the survival of a part of an old Act, notwithstanding subsequent legislation upon the same subject largely affecting and changing parts of the old law. There a statute fixed a tax on the exercise of a certain privilege, and a penalty for exercising it without a license. A subsequent Act changed the tax and provided a summary remedy for its collection, but was silent as to the penalty. It was held that both Acts should stand together, in so far as the penalty was concerned, inasmuch as there was no necessary repugnancy between the Acts with reference to this feature. '3 Sneed, 120.

An effort has been made to narrow the scope of the Code article by arguments addressed to the constitutionality of the provisions concerning confinement at hard labor of persons held only for safe-keeping. This provision is certainly subject to grave objections; and when a case arises where one detained only for safe-keeping has been compelled

against his will to do hard labor, the matter will have that degree of consideration which the gravity of the constitutional question involved demands. It is enough to say that no such question is now before us. Neither can we assume that the Legislature of 1875 deemed it unnecessary to expressly repeal the provisions involving this question because of its supposed unconstitutionality. If those provisions were ever valid, they were unaffected by the Act of 1875. So the provisions concerning persons held for punishment, if ever valid, were not repealed by that Act. That this section was not repealed by the later Act was expressly held by a unanimous Court in the case of *Eaton v. State*, reported in 15 Lea, 200. The question was directly passed upon, and a work-house sentence approved and affirmed. The decision, we think, was sound, and the case ought to be followed.

The objection that this provision is obnoxious to the Constitution remains to be considered. The provision supposed to prevent such legislation is the eighth section of the Bill of Rights, providing that no one shall be "deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land."

Where the conviction is for a misdemeanor, and the punishment is not prescribed by statute, the trial Judge may punish by a fine not exceeding fifty dollars, and imprisonment not exceeding one year, either or both in his discretion. This is well settled, and does not violate any constitutional

privilege. *Atchison v. State*, 13 Lea, 275; 7 Cold., 726.

Thus, a wide discretion is reposed in the Magistrate, and he is enabled to graduate punishment with some regard to the circumstances of the particular case. That this discretion as to the nature and duration of punishment may be committed to a Judge without violation of the constitutional proviso above quoted, is due to the fact that at the common law the kind and extent of punishment, in the absence of a statute prescribing the punishment, was left to the trial Judge. So the ancient statutes prescribing punishments very frequently fixed a limit and permitted the Judge, within such limit, to determine the punishment. In either case there is no violation of the right of trial by jury. The guilt of the defendant has been determined by a jury, and the law attaches to the verdict the punishment prescribed by the Judge if within the limits prescribed by law. Statutes prescribing imprisonment for felony not to exceed a certain number of years, and with or without hard labor, in the discretion of the Court, are by no means unusual, and we have been unable to find any authority questioning the validity of such statutes. It is not easy to understand why a Judge may, in his discretion, inflict imprisonment not exceeding one year, and yet may not be empowered to add labor as a part of the sentence. Hard labor is not an unusual or a cruel punishment. *Purvear v. Mass.*, 5 Wall., 475.

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Statutes requiring a sentence of hard labor, or authorizing the requirement of labor as a means of discipline by the officers of institutions where persons are confined for punishment, have never been questioned. Teideman Pub. Pol., Sec. 35. That it may be imposed by a jury is not now challenged. But if, upon a verdict of guilty, the law attaches hard labor as a consequence of such imprisonment as the Court may lawfully impose, then hard labor becomes a part of the verdict, and is an incident. That it may or may not be imposed by the Court, in his discretion, cannot be any more objectionable than that he may or may not impose imprisonment.

Under an Act of Congress, a person convicted of a Federal offense may be imprisoned in any State penitentiary selected by the Court. By another Act, the convict so imprisoned in a State institution was subjected to the State authority, and to all the rules and regulations governing State convicts. Under an Act of Congress one Karstendick was convicted of an offense punishable by confinement in a penitentiary. He was ordered to be incarcerated in the penitentiary of West Virginia, where hard labor was required of all inmates as a rule of the institution. Upon a writ of *habeas corpus* the Supreme Court of the United States held that the trial Court might, in its discretion, have the sentence executed in a prison where such labor was required, although hard labor was no part of the judgment required by

law under the Act upon which he had been convicted.

With reference to this discretion resulting from the Acts of Congress allowing a Court to execute its sentence in any of many prison houses, the Chief Justice said: "Thus a wide range of punishment is given, and the Courts are left at liberty to graduate their sentences so as to meet the ever varying circumstances of the cases which come before them:" *Ex parte Karstendick*, 93 U. S., 399. This doctrine was again approved in *re Mills*, 135 U. S., 266.

The Federal Constitution contains the same provisions with respect to the protection of life, liberty, and property, and in regard to right of trial by jury, as are contained in our own Constitution.

The imposition of labor as a means of discipline and a measure of health is neither cruel or unusual. It operates, when rightly regulated, as a mitigation rather than an aggravation of the punishment involved in imprisonment. It is not in itself disgraceful or degrading, but beneficial and humane. The misdemeanant may be disgraced and degraded by his punishment, but he cannot ascribe his degradation to his labor. To a certain degree it compels crime to support itself, and in many ways the power to require convicts to labor is a valuable addition to the forces of law and order. The fact that it may be imposed, in the discretion of the Court, operates to widen the power of graduating sentences to meet the merits of

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particular cases. If a wider discretion were reposed in Criminal Judges, in regard to the kind and duration of punishment, it might not be the worse for society.

The writ of error and supersedeas must be dismissed, and a *procedendo* issued requiring execution of the sentence imposed.

DISSENTING OPINION.

SNODGRASS, J. Durham was indicted in the Circuit Court of Sumner County at the June Term, 1886, for the murder of Joseph Brown. He was tried at the October Term, 1887, and found guilty of assault and battery.

Thereupon it was adjudged by the Court that he be confined in the county work-house at hard labor for three months, and pay a fine of fifty dollars, taxes and cost. He at once gave sureties for the fine and costs, including taxes, and judgment was accordingly rendered against them therefor, and execution awarded.

The defendant filed the record for error accompanied by petition alleging that the Chairman of the County Court had hired him out, and given the Sheriff an order to turn him over to the person hiring him, but the Sheriff refuses to do so, and keeps him confined in jail.

He avers that the judgment is in excess of the

authority of the Circuit Judge, and is void; that a work-house sentence can only be imposed for failure to pay or secure fine and cost, and that having secured these to the satisfaction of the Court, he cannot be sentenced to the work-house, and his confinement in jail under such sentence is unlawful.

Writ of error and supersedeas issued, and the case was heard on its merits at a former term, and during the absence of the Chief Justice, whose place was then filled by Thomas H. Malone, an explanation necessary to account for the participation of Judge Malone and non-participation of Judge Turney in this opinion.

On the hearing the Court divided in opinion, Judge Malone and the writer deeming the judgment without authority of law and void, and the majority holding it valid. Its importance required a written opinion, and the case was carried over for that purpose.

For the State it is insisted, and the majority so holds, that the judgment is authorized under the Code of 1858 providing for a house of correction. The sections of the Code treated as in force are brought forward in the editions of Thompson & Steger and Milliken & Vertrees. In the latter they are included as §§ 6256 to 6263 inclusive, and make up the whole of Article IV. of the Code. To fully understand them, and the views herein presented respecting them, it is necessary to quote in full. They are as follows:

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"ARTICLE IV.

"HOUSE OF CORRECTION.

"6256. The County Court of any county, and the authorities of any corporate town, may provide such lands, buildings, and articles of any kind as may be necessary for a work-house, or house of correction, for such county or town; and may appoint suitable persons for the management thereof, and make all necessary by-laws and regulations for the government of the inmates, and cause the same to be enforced.

"6257. In no case shall the punishment inflicted in said work-house exceed hard labor.

"6258. Any person who may be required to find sureties for his good behavior under the provisions of the chapter on vagrancy, may, for want of such sureties, be sent by the Magistrate before whom he is brought, to the work-house of the town or county in which the offense is committed.

"6259. In all cases where a person is by law liable to be imprisoned in the county jail for safe-keeping or punishment, confinement in the work-house, if one be provided, may, in the discretion of the Court or Justice, be substituted.

"6260. If he be confined for safe-keeping, his earnings, after paying for his board, shall be paid over to him on his discharge.

"6261. If he be confined for failure to pay a fine and costs, he shall be detained until he shall pay the fine and costs by the proceeds of his labor,

and shall not be allowed to discharge himself by the act of insolvency.

"6262. If he be committed for punishment also, the proceeds of his labor, during the term of his punishment, shall go to the county if he have no wife or children; but if he have, one-half thereof shall be paid to them.

"6263. After the term for which he is imprisoned has expired, he shall be detained until the fine and costs are paid, as above provided."

If this is a valid law, and is not superseded or repealed by any other, it justifies the action of the Circuit Judge. The majority holds it is, for reasons assigned in their opinion, which are to be considered in connection with other views on the same subject to be hereinafter stated. I am of opinion it never was a valid law, for reasons absolutely conclusive to my mind, and which I think are suggested by the soundest constitutional principles. First, it will be observed that the "house of correction," with hard labor, was provided for all persons liable to imprisonment for safe-keeping or punishment, or because unable to give security for vagrancy; that it was provided as well for persons *committed* by the Magistrate as for those convicted and committed for punishment by any Court or for any offense.

By the terms of this Act, it includes all persons *imprisoned*, whether for safe-keeping, contempt, vagrancy, punishment for crime, or any detention authorized by law for which one is liable to be imprisoned.

Now, it cannot be insisted by any one (and the reservation of that question by the majority was unnecessary, because the Court could not be assumed to so believe) that the statute is valid so far as it imposes hard labor on persons merely held in custody and not convicted or adjudged by anybody to be guilty of any offense. That the man who is committed by a Magistrate and bound over to answer for a crime, or arrested on a *capias* and committed to jail to await the meeting of Court for trial, or committed because unable to give security as bail of vagrant, witness, or otherwise, can be put to hard labor because this Act says so, I do not understand anybody to assert, and feel sure the majority would regret to be understood as asserting; but if it were asserted by anybody, it would find no one to believe it, and so need not be argued. It is, then, a statute of no force whatever except as to commitments for punishment, embraced in about three lines only of the entire Act.

This elimination of all the Act save these lines is accomplished by striking out from it the provisions for working any imprisoned persons except those committed for *punishment*. As to those confined for failure to pay fine and costs, this Act is unquestionably superseded by the Act of 1875, which in express terms makes provision for the working of such prisoners in the "work-house" therein created and provided for.

If, then, we eliminate from the house of correction

statute all commitments by a Magistrate, or by the Courts merely for safe-keeping or legal detention, and it is superseded as to those committed for failure to pay fine and costs, the statute is alone held valid and in force for one of the many purposes for which it was passed.

Let us now look to the question in this view, and see what provision, if any, is made for working persons committed for punishment. Section 6262 provides that "if a person be committed for punishment, the proceeds of his labor, during the term of his imprisonment, shall go to the county if he have no wife or children, but if he have, one-half thereof shall be paid to them;" and § 6263 declares that "after the term for which he is imprisoned has expired, he shall be detained until the fine and costs are paid, as above provided." No provision was made for whom or how he should work, or at what rate he should be compensated, and therefore the Act was invalid, because such omission made it an impracticable system which could not be carried into operation.

In the work-house Act of 1875, as we shall presently see, this obvious defect, which made the law impossible of enforcement, was remedied so far as the latter Act undertook to provide for working out fine and costs, for it determines how the convicted defendant shall work, and what amount he shall be paid or allowed for his work as a credit on fine and costs.

The former Act, even as to one committed for

punishment, we repeat, made no provision as to the person who should work the prisoner, at what work, or at what wages. There is no provision for hiring him out, and neither State nor county is required to pay him, and yet in general terms it is provided that he shall work, and for a *compensation*, because the Act says that if he have a wife or children one-half the compensation for his labor shall go to them; if he have none, it shall all go to the county. Go from whom?

It was also provided that if the prisoner be confined for safe-keeping his earnings, after paying his board, shall be paid over to him. So that it is clear the Legislature had a general vague purpose that every prisoner was to work for and be paid by some one, but it neglected to provide for whom or at what compensation. Nor was this plain defect in the law, in consequence of which it was wholly inefficient and inoperative, cured by the general provision of § 6256 that the County Court might provide lands, buildings, and articles for a work-house or house of correction, and appoint suitable persons for the management thereof, and make all necessary by-laws and regulations for the government of the inmates, and cause the same to be enforced, because making by-laws "for the government of the inmates" has nothing to do with fixing their compensation, and no authority whatever is given to hire them to anybody who will pay for their labor.

Now, treating the Act as intending that the

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prisoners should be worked for the counties—because the house and land and articles to be furnished in and on which they were to work were to be furnished by the counties, and the Act has no provision and authorizes none to be made whereby they could be hired out or worked elsewhere than in the property so furnished—the Court would not by construction extend the power given in such a clause “to make by-laws and regulations,” to include the right to fix wages and hire out convicts at the unlimited discretion of every County Court, where one could fix one rate and another a different one, and the compensation of prisoners depend and the duration of their confinement depend on such uncertain, variable, and arbitrary discretion. Human rights and liberty have not again become cheap enough for that in this country.

Suppose such a construction was given the Act, what would have been the result while the provision was in force that a prisoner should be detained until fine and costs were paid, as provided in § 6263? In one county ten cents a day might have been fixed as compensation; in another 25, and 50, 75, or 100 cents in others. The detention would depend upon the different discretions of different County Courts, and be longer or shorter for the same fine and costs, as determined by the county in which the commitment was made. Such a result is the only one that follows a construction giving County Courts power to fix com-

pensation. It is inconsistent with reason and justice; and it has been expressly held to be inconsistent with the constitutional rights of an imprisoned defendant by our predecessors in a case arising under the work-house Act of 1875. That Act, in terms, provided that persons confined in the work-house for failure to pay fine and costs should not be discharged until the cost of all necessary clothing provided for them had been fully paid; and this Court, speaking through Judge McFarland, held that this provision was void, because it required imprisonment and labor continued to pay an indefinite and uncertain amount left to the discretion of the authorities furnishing the clothing, subject to great abuse, and to the objection that the imprisonment might be indefinitely prolonged; and was not the "law of the land" in the sense of the Constitution. *Knox v. State*, 9 Bax., 202.

This case strongly presents the view we are stating, and establishes the principle for which we contend. It seems to me, however, not to need support of authority, but to be obviously apparent that a law providing for such unascertained compensation or to pay for unvalued supplies is void; and yet the majority, if I gather its position clearly, from the rather cautious manner in which the point is dealt with, treats the law under consideration here as valid because, while fixing no rate of compensation, it is by construction left to the county authorities into whose hands

the prisoner falls when sent to the county work-house.

It, however, advances another view to sustain the law; and that is that if the defect suggested was a vital objection to it, the Act of 1875 now amends it and fixes the rate of compensation. But this assumes the whole question, and, without intending to do so, admits that the former law is void. It either assumes that the law could have been in existence as a valid law from the date of its passage to 1875, the date of amendment, although incapable of execution for want of the provision indicated, which cannot be true, or it admits that the law needed the amendment to be valid, and therefore has been always void. In either event the admission of the necessity of the provision destroys the proposition that the law was valid. Then, if it was not valid in itself, there was nothing to amend, and the Act of 1875 did not amend it. It will have been noticed, too, that the majority does not assume that the Act of 1875 intends or expressly makes this amendment. It is only assumed that there is a rate proper to be fixed *now* as compensation for persons imprisoned under the former Act for *punishment*, because the latter fixes a rate to be paid to one who is imprisoned to work out fine and costs. It is not held to amend the other in terms, and confessedly does not refer to the special omission of the former, but the amendment is assumed upon an analogy. Hence, we have a for-

mer law not only amended, but a void law vitalized by a subsequent one, which is applied on an analogous principle. We shall have more to say of this provision hereinafter, but we respectfully insist that the last law can have no such effect. In this connection we submit an inquiry: Suppose the wives or children of persons committed for punishment before 1875 had sued for the one-half due them, could they have recovered, and what? Suppose they sue now for one-half the proceeds of labor of such persons since 1875, will they be entitled to recover twelve and one-half cents per day of those who received the husband's and father's labor? or, when such question arises, will the disposition now made of it be declared non-material and the position be abandoned, and the law be held not to provide for such compensation?

In this connection we also call attention to the fact that there has never been any compliance with it or effort to enforce it in this or any other particular. It was not only wrong in all its policy, but was so vague and indefinite and incapable of enforcement that it was from its inception a dead letter, and has become obsolete. No effort has been made, so far as the records of this Court disclose or the observation of the writer goes, until the present, with one exception, to apply it.

It is referred to and recognized as valid by our predecessors in the case of *Eaton v. State*, 15 Lea, 200. But no question was made upon its validity in that case, and it was merely treated as

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valid because not questioned. This of course happens in respect to many statutes, a notable instance being that in which it was provided, when this Court was composed of six members, and equally divided in opinion as to affirmance or reversal, the judgment of the Court below should be affirmed. After this law had been acted upon, and several judgments affirmed under it, and its validity of course thus assumed, the question was made that it was unconstitutional, and the Court so held.

Many cases have occurred illustrating this position, but this one is selected because it was one vitally affecting the practice of this Court, and if in such case it would overlook such a question, it is clear that a case overlooking a more remote constitutional question cannot be relied on as authority affirmatively adjudging the constitutionality of a law never brought directly in question.

I feel sure that, had the question been made, the learned author of that opinion would not have held the law valid.

Let us now inquire whether this law be valid under the Constitution, if it were neither vague nor doubtful, and treating it as specifically providing for the working at hard labor of only persons committed for punishment.

It is clear that the Legislature can make assault and battery a crime, and it is not denied that the Legislature could have made it punishable by imprisonment at hard labor. But it is not pretended

that it has done so. Assault and battery is, and was before the statute now being considered was passed, a misdemeanor at common law; and, as such, may have been punished by fine, or fine and imprisonment. One or both of these punishments may have been always in this State imposed by the Circuit Judge upon an offender found guilty by a jury. *Wickham v. State*, 7 Cold., 525.

This case states the law as it always existed in Tennessee. The question we are considering is a wholly different one. It is whether this common law offense, punishable by this common law punishment, can be, without express statute so providing, and upon the verdict of a jury so directing, converted by a Circuit Judge in a sentence, into a crime punishable by hard labor, and whether such sentence can be authorized under an Act providing that he may, in his discretion, so direct the punishment of all persons convicted of any offense punishable by imprisonment in the county jail. I deny that any such power to add hard labor to the imprisonment exists, and say that it cannot be exercised unless the punishment is expressly fixed by statute.

There is nothing in the cases cited by the majority from 5 Wall., 93, and 135 U. S., in antagonism to this position. On the contrary, they are in harmony with it. They were in construction of State statutes expressly authorizing it (a power conceded herein), and of Federal statutes expressly held to extend to it in equivalent terms. They

do not decide, as assumed, any question as to the punishment being or not being cruel and unusual, when inflicted by a Judge exercising the common law discretion.

Any imprisonment and any punishment authorized to be imposed by a Judge alone when our Constitution was adopted, is still authorized by that instrument. No other is permitted, because the Constitution declares that "cruel and unusual punishments shall not be inflicted." Art. I., §16.

At the time of the adoption of this Constitution, and of the others preceding, it was lawful for a Circuit Judge to impose imprisonment on a defendant convicted of assault and battery or other misdemeanor. 13 Lea, 276. It was not lawful when this provision was first adopted for him to impose hard labor as an additional punishment.

The eighth section of the same article added "that no man shall be taken or imprisoned, or disseized of his freehold liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land."

The effect of these sections is to leave in the hands of the Circuit Judge the same power he then had to imprison, and no more than he originally had before their first adoption. He could not impose hard labor when they were adopted. He cannot do it now, because it is a cruel and unusual punishment by him.

In this connection it is proper to note the assumption of the majority that the labor imposed by sentence is not cruel, unusual, or degrading—that it is only imprisonment which degrades, while the labor exalts and benefits. It is true that labor *per se* is not only not degrading but highly honorable. The unconstrained labor of a free man is the highest exertion of right and duty, but the enforced labor of servitude is, for the same reason and by common consent, the most degrading act which can be compelled by law. Just as purity, which when unsullied is the loftiest virtue, evidences the lowest debasement when sullied. Once the imposition of labor to imprisonment was the distinguishing feature between the punishment of *offenses* and infamous *crimes*. By common consent of mankind imprisonment is not always degrading, but labor added is.

Again, the right to a man's labor is his property, and it cannot be taken from him under the eighth section quoted unless done by a jury. The Legislature could pass a law authorizing the jury to inflict hard labor as a part of the punishment for this offense, or probably make it discretionary, but no Act of the Legislature not expressly making hard labor the punishment will authorize a Circuit Judge to do so *in his discretion*.

It could command him to do it as the necessary result of a verdict, for then it would follow because of the verdict of a jury; but it cannot commit it to the discretion of the Judge, because he

alone then determines it. In doing so he takes from the defendant the property which he has in his labor, without the judgment of his peers or the law of the land (in this connection meaning the same thing—a fixed result universally applicable), in addition to the infliction of a cruel and unusual punishment.

So far we have been, in this connection, considering this statute as an existing one. We have shown, we think, that it was originally invalid, because confessedly attempting to inflict a degrading punishment on unconvicted and untried persons—upon the innocent and guilty alike—and as being incapable of enforcement because of its vagueness and inherent defects. Following this we have endeavored to establish that the Act was unconstitutional, because it authorized indefinite imprisonment; and was not the law of the land; because it authorized the deprivation of the right of property in his labor, which even an imprisoned man has, without the judgment of his peers; and because it authorized the infliction of a cruel and unusual punishment.

Now we propose to show that the Act is no longer an existing statute, because it has been repealed by the work-house Act of 1875. This Act is Chapter 133 of that year, pages 117 to 121. It originated a complete work-house system in contradistinction to the “house of correction” legislation of the Code, and provided, by specific and elaborate details, for the establishment of work-

houses, management of them, working of prisoners, and the allowance of compensation to them, to be credited on the fine and costs adjudged against them. It provided for the working out of *costs* by persons convicted of misdemeanors. This was its object, as stated in the caption. The caption does not, in terms, include *finer*. It reads: "An Act to require persons convicted of misdemeanors to work out the *costs* of the conviction." The first section negatives the idea that the confinement of a defendant imprisoned for punishment merely should be in the work-house, because it declares "that hereafter every person convicted of a misdemeanor who fails to pay or satisfactorily secure the fine and costs adjudged against him or her, shall be sentenced to be confined, and shall be confined, in the county work-house, *after the term of his or her imprisonment, if any, has expired*, until he work out his fine and costs, including all jailer's fees accruing before and after conviction and down to final discharge."

This system, it must be noticed, does not embrace labor for unconvicted persons or the poor and unemployed who may be committed to jail. It does not embrace those committed by a Magistrate or a Judge without a trial, or for safe-keeping or mere detention, all of which defects in the other system are eliminated by common consent. It does include working out of fines and costs provided for in the "house of correction" statute, and the only thing of force in

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that statute which it does not comprehend is the working at hard labor of a person *committed to jail for punishment*. This is not omitted by mistake, because it specially refers to such class of prisoners, and provides for their confinement and labor in the work-house only to secure fine and costs *after their imprisonment in jail has expired*.

Is it conceivable that we have two systems still in force in Tennessee—two work-house systems!—one the house of correction system of the Code, applicable alone to the imprisonment of a defendant for punishment, who can be made to labor under that law; and the other applicable to persons who have failed to pay or secure costs and fines?

It is not pretended that the Act of 1875 authorizes imprisonment at hard labor for punishment; it is not pretended that it justifies it; but it is said that, although it is a system in itself, and does not purport to amend the house of correction law, but is legislation upon the same subject, and so elaborate as to make a perfect system, free from the various defects pointed out in the Act establishing the other system, it is not a repeal of the other law, because the working of a convicted defendant is not provided for, and hence there is no necessary conflict.

This is predicated upon the principle that implied repeals are not favored, and that one statute will not be held to repeal another unless they are plainly inconsistent; and the authorities cited by

the majority are only to this point. This law of construction is well recognized, but not properly applied. It is not the one applicable here, nor the only one applicable in construing repealing statutes. It is equally well settled that where *one system* is superseded by *another* the former is repealed, though the latter omits provisions of the former which are not inconsistent with any provisions of the latter. And if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute clearly intends to prescribe the only rule (or system), it repeals the former one. 17 Wall., 425; 3 Howard, 636; 97 U. S., 546; 107 U. S., 445.

A statute purporting (or intended) to cover an entire subject, repeals all former statutes on the same subject, either with or without a repealing clause, and notwithstanding it may omit material provisions of the earlier statutes. *Terrell v. State*, 86 Tenn., 523.

A fortiori, would the adoption of a perfect system remedying the defects of a former vague and uncertain one, and prescribing general rules for the operation of the latter, embracing all the legal provisions of the former, except one of doubtful construction, and that omitted by express exclusion, take the place of the former and repeal it?

It seems, however, superfluous to argue this question. The mere suggestion that we have two such parallel systems in Tennessee for different

classes of imprisoned persons, the first the house of correction system and the other the work-house system, it seems to me, is its refutation. But it is insisted that the work-house Act of 1875 amends the other, and leaves in force the right to imprison at hard labor for punishment. This can be conclusively shown to be untenable, because, in addition to the exclusion of such an imprisonment from the latter law, as shown in Section 1 of the Act of 1875, it appears that no provision is made for the compensation of such a convict, while the Code expressly directs that one-half his compensation, if a married man, be paid to his family. Paid by whom under the Act of 1875, and at what rate? No provision respecting payment of any such compensation is made. It is provided that a prisoner, working out fine and costs, shall be credited at the rate of twenty-five cents a day, but no compensation to be *paid* any one is fixed. Can we properly sit in a criminal case and say, as a Court of Equity, that the other ought to have the same, and that some undesignated party shall pay his family twelve and a half cents a day? We can say it if we will. There is no power to restrain us; but is it law, or is it justified by any rule of right or reason? Where does this Court, in the absence of express statute, get the power to take an equitable account in a criminal case and solemnly adjudge that it is intended by this statute—which does not say so, but instead says such a prisoner shall only be confined

in the work-house after his other imprisonment has expired—that such prisoner's wife or children shall be paid, and only paid twelve and a half cents a day? But if we do not hold that, what shall we hold? They are to be paid under the former statute, and by whom under either?

These considerations force the conclusion that this latter Act is not an amendment, but a repeal, and it is vain to avoid the force of them by saying that no question of compensation is now involved. It is not because such a question has arisen that it is referred to, but it is to show that the other Act—vague, defective, and incapable of enforcement—is not remedied by this.

But to illustrate still further, let us assume that the last Act is an amendment, what is the result? The work-house law of 1875 would have one additional section, reading thus: "Notwithstanding the provision of the first section of this Act that one committed to jail for punishment shall, after the expiration of such term, commence, in the work-house herein provided for, a term to work out fine and costs, nevertheless it is declared that such convict shall serve out such original term herein; and if he be a married man, one-half the proceeds of his labor in such term shall be paid to his wife and children, if he have wife or children, otherwise to the county."

This section would omit, it is again urged, the provision for amount and payor. It needs another section to perfect it. This we must add by judicial

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construction to this effect, "And the Legislature having omitted to say who should pay such compensation, and what rate should be paid, and it appearing that on fine and cost a credit of twenty-five cents per day is allowed a prisoner working out such fine and cost, and that this goes to the county, therefore the prisoner held for punishment is entitled to that amount, and the county must pay his family twelve and one-half cents per day."

This might be equity, but as an account of human servitude so taken I shall never cease to regret that it can be law.

I conclude that the house of correction law was void on its face for vagueness, was unconstitutional when passed, disregarded in practice, obsolete by general consent, and repealed by the Act of 1875, and that the judgment directing the confinement of defendant in the work-house was void, and that he having secured the fine and cost, and thereby complied with all of the judgment which was valid, is entitled to be discharged.

Judge Malone concurs with me in this opinion.



James W. Deadrick

A TRIBUTE
TO THE MEMORY OF
HON. JAMES W. DEADERICK,
A FORMER CHIEF JUSTICE OF TENNESSEE.

At a meeting of the bar of the State held in the Supreme Court room at Knoxville, Tenn., on October 11, 1890, for the purpose of taking appropriate action with reference to the death of Hon. James W. Deaderick, late Chief Justice of the Supreme Court of Tennessee, the Hon. W. L. Eakin, of Chattanooga, was called to the chair, and Charles Nelson, Esq., of Knoxville, was elected secretary.

After the appointment of a committee on resolutions, the meeting adjourned until the twenty-fifth of October, 1890.

At the meeting on the twenty-fifth of October, 1890, Hon. W. L. Eakin being absent, the Hon. Thomas J. Freeman was called to the chair. The committee on resolutions reported the following, which were unanimously adopted, after which the meeting adjourned *sine die*:

THE RESOLUTIONS.

JAMES W. DEADERICK, jurist, judge, and gentleman, led by serene old age, has gone to his final rest, having more than filled the measure allotted by the scriptural

psalmist to the life of man. We have met to make some expression of our estimate of our departed brother, and of our sorrow because he is no longer with us.

Intellectual aptitude, independent integrity, and gentlemanly instincts he had by hereditary transmission, and from the way of his fathers he never departed. He was born on November 28, 1812, the child of David Deaderick and Margaret Deaderick, *nee* Anderson, in the old historic town of Jonesboro. The family of which he came, in both lines, had during several generations been adorned by men and women of force, culture, and great moral purity and excellence. His father, by birth a Virginian, held an important fiduciary position in the army during the War of Independence, immigrated into Tennessee at an early day in the history of the State, and became a resident citizen of Jonesboro, where he lived until his death, distinguished for absolute and unqualified integrity, strong sense, and general intelligence. He was president of the Jonesboro branch of the first bank of the State of Tennessee, and represented the county of Washington in the General Assembly. Other members of the family were highly esteemed and reached much distinction, the memory of one of whom is perpetuated in the street nomenclature of the city of Nashville. His mother was of a Delaware stock, many individuals of which were famed in revolutionary annals for their patriotism and valor. Six of her brothers were of these, the eldest of whom, Joseph Anderson, immigrated into Tennessee, became the first Senator from the State in the United States Congress, was made a Judge of the District Court of the United States here established, and was afterward for many years Comptroller of the Treasury of the United States. She had a fine taste for polite literature, and was an elegant and accomplished woman.

With such parentage the domestic education of Judge

Deaderick was necessarily good. His collegiate training was in the East Tennessee College, now the University of Tennessee, and subsequently in Centre College, at Danville, State of Kentucky. He was not graduated, because of an event which happened before his majority, and which was of more happy consequence to him than would have been a degree—wedlock with Adeline, daughter of Dr. Ephraim McDowell, who, with the exception of Dudley, was probably then the most eminent surgeon of the South-west. Her mother, whose father was Gov. Isaac Shelby, had the distinction of being the first-born white female child of “the dark and bloody ground.”

Judge Deaderick's first drift in avocation was agricultural and mercantile, at Cheek's Cross-roads, then in Jefferson, now in Hamblen County. The result was defeat and failure, and his home was subjected to the peremptory and sweeping desolation of an execution at law, but his personal reputation passed unhurt through this crucial ordeal. The disaster was a blessing in disguise.

A pebble in the streamlet scant
Has changed the course of many a river ;
A dew-drop on the baby plant
Has warped the giant oak forever.

After a brief residence in Iowa, as Indian Agent for the Pottowattomies, under appointment by President Tyler, Judge Deaderick returned to Jonesboro, and entered upon a course of legal study. His preceptor was that able judge and most excellent man, Seth J. W. Luckey, who, jointly with the great Chancellor of East Tennessee, Thomas L. Williams, in the year 1844, when he was of the age of thirty-two years, admitted him to the bar.

Eminent success in the legal profession is not reached by the larger number of its devotees—certainly but few, beginning as late in life as did Judge Deaderick, have

reached its summit—the office of presiding judge of the court of last resort. He fully appreciated the difficulties that would have to be surmounted, lying all along the road to the objective point of his ambition and his hopes, in the far and dim distance. Once in an hour of despondence he was approached by the generous Thomas A. R. Nelson, already occupying the commanding position among lawyers and among men which he held with signal power and signal honor until his untimely death, ever ready to give a helping hand to the struggling young lawyer, with these words: “I know enough of the law and of you to feel sure that if you will persevere you will succeed;” a prediction that had its final fulfillment when the two friends in after years sat down together as associate judges on the bench of the Supreme Court of Tennessee.

Judge Deaderick was well read in the English classics when he commenced his legal course; had from youth been an ardent student, which compensated to some extent lapse of time, and much facilitated his progress. He read the books that expounded the science of law, books now, unfortunately for the young lawyer, relegated to the upper shelf, whereby his mind was imbued with the fundamental precepts of the law, and at the same time trained to legal thought. He came to the bar with a good working equipment of law. This at that day more than now was a *sine qua non* to success. It was not then the general practice for the lawyer to make himself acquainted only with particular questions as they arose *pro re nata*. He was not a great advocate like his contemporary, John Netherland, but he argued his causes with much force. He did not practice the arts of the dexterous practitioner. He never fomented litigation; never encouraged malicious and wrongful suits. He never sought business by ways and means that are dishonorable. He was a man of truth and of honor. In all his intercourse and associations with men

he was most courteous in his manners, and adhered strictly to the principles of honor and integrity that were implanted in his breast.

Judge Deaderick was in the senatorial branch of the General Assembly, session of 1851-52, and as chairman of the committee on internal improvements took an active part in favor of the system of State aid to railroad construction then established.

In the memorable presidential election of 1860, fraught with tremendous consequences, he was candidate for elector in the first district, on the Bell and Everett ticket.

When the war between the States became imminent, he contemplated the coming struggle with pain, regret, and misgiving of the result to the South; but on the first clash of arms he without hesitation espoused the cause of the Confederate States, under the flag of which his sons fought, and were among "the bravest of the brave."

When our judiciary was re-organized, under the provisions of the Constitution of 1870, Judge Deaderick was elected one of the judges of the Supreme Court. On the expiration of the term he was again chosen, this time for the State at large. Upon the death of Judge Nicholson, during the first term under the new Constitution, Judge Deaderick was chosen by his associates Chief Justice, which position he occupied with ability, dignity, courtesy, and to the entire satisfaction of the Court and bar to the close of his judicial service.

On the judgment seat Judge Deaderick exhibited great judicial excellence. He was a patient listener, recognizing that counsel who had been for many days searching the books for all that could be found on the topic in hand, and who had laboriously collected and collated the facts, might be of great service in reaching a correct and just conclusion, although he might be a

junior. His judgment was sound and safe, always under the dominion of cautious conservatism. The opinions which he delivered, all of which were carefully written, were ably reasoned, and expressed in such clear, direct language that the decision made, and the doctrine held, are plain and intelligible to the commonest mind.

With him justice was the great interest of men on earth, and he measured it out, equal and exact, to all men of whatever state or persuasion. He wrote no line that, leaving his great office, he could wish to blot. Sixteen years he wore the ermine, and when he put it off it was as immaculate as when he put it on.

On the expiration of his second term Judge Deaderick was not a candidate for further continuance in office. Full of years and full of honors, he sought the repose of his home in the place of his nativity, and there awaited the inevitable hour. On October 8, 1890, he died; but he had so lived that, dying, he could calmly smile while all around him wept. Such a passing away is a harvest, not a blight. Therefore:

Resolved, That the death of James W. Deaderick impresses us with a profound sense of loss to the commonwealth, and of bereavement in social life.

Resolved, That it was well for us that he lived, and that dead we owe him the tributes of our gratitude, our praise, our love, and undying remembrance.

Resolved, That to his family, and especially to his venerable wife, him surviving, we extend our most respectful and sincere sympathy.

Resolved, That we request George W. Pickle, Esq., Attorney-general for the State, to present to the Supreme Court, now in session, a transcript of our proceedings on this solemn occasion, and ask that they be entered of record *in perpetuam rei memoriam*, and for the end of publicity that the newspapers of the city be requested to publish them; and that the Attorney-general be re-

quested to publish these proceedings as an appendix to the next volume of published reports.

JAMES T. SHIELD, *Chairman*,
S. J. KIRKPATRICK,
W. P. WASHBURN,
JAMES G. ROSE,
FRANK M. FULKERSON,
W. A. HENDERSON,
P. B. MAYFIELD,
J. B. COOKE,
ROBERT M. BARTON,
J. B. HEISKELL,
ED H. EAST.

RULES.

RULES
—OF THE—
SUPREME COURT
—OF THE—
STATE OF TENNESSEE.

COSTS OF INFERIOR COURTS.

1. The Clerk of this Court, in retaxing bills of costs sent up from the inferior Courts, shall correct the same, so that no illegal item of cost may be embraced in any bill of cost sent out from this Court.

TRANSCRIPTS.

2. All transcripts from the inferior Courts shall be written in a large, plain, and legible hand, or printed or type-written. It shall be so written on only one side of the paper, with black ink, upon law paper, in length fourteen inches and in width eight and one-half inches, with half an inch between the lines, having a blank margin on the left of every page, and the whole firmly attached at the top.

3. Clerks shall make out transcripts so that process, pleadings, rules, orders, decrees, judgments, and steps of whatever kind, shall be entered in the order of sequence as they occurred in the progress of the cause. The date of issuance of process and of the filing of pleadings, and the date of rules made in the Clerk's office, and the date and terms of rules, orders, decrees,

judgments, and steps of every kind made in Court, shall precede the entry of the same, respectively, in the transcript; and the Clerk shall make a minute and perfect index of the contents of the transcript. In case there be any failure, omission, or defect as to any of these particulars by the Clerk of the inferior Court, he shall not be allowed any cost for the transcript wherein such failure, omission, or defect occurs.

4. Unless there is a question on the same in the Court below, no notice to take depositions, nor caption of any deposition, nor affidavit, nor any other unnecessary paper, shall be inserted in the transcript; nor shall any fee be allowed any clerk for such matter. But the date of service of each paper so omitted shall be given, and also the time and place at which the deposition was taken, and who of the parties were present. And in copying depositions taken upon interrogatories, the answer shall follow each question. Reports and accounts shall follow the orders or decrees on which they are based, when practicable, and be followed by the proof on which they are taken. No report of receivers, or other matter not affecting the questions in controversy, shall be put in the transcript unless required by counsel, and then it shall be stated at whose instance it was done, and the cost thereof will be charged accordingly.

5. The Clerks of the inferior Courts shall make out and file the transcripts for this Court within the time prescribed by law, unless it be shown to have been impracticable; and no transcript, after it has been filed, shall be taken from the court-house by counsel engaged in a cause without the Clerk's permission or a receipt given therefor; and no transcript shall be carried out of the city in which the Court is held unless upon the order of the Court or one of the Judges, or unless it is otherwise directed by rule or general order of the Court, or where counsel desire the record in order to

prepare brief required under these rules ; in which case they will be allowed to take such records without order upon giving receipt therefor to the Clerk.

6. When a Clerk of an inferior Court shall fail to make out and file with the Clerk of this Court a transcript of the record in any cause in which the State of Tennessee is a party, in which an appeal is prayed and granted in the time and manner prescribed by law, no cost will be allowed to such Clerk in such case.

7. In all transcripts, civil and criminal, hereafter sent to this Court, the Clerks of the inferior Courts shall indorse on the same the names of counsel for plaintiffs and defendants in their Courts, and of plaintiffs and defendants in the Supreme Court (if known to them), and on their failure to do so, they will forfeit their fees in such cases.

8. When executions or other process are issued from this Court, the Clerk shall pay the postage on such process necessary to get it into the hands of the officer to whom directed, and tax the same in the bill of costs, and the officer to whom execution or process is issued and returnable to this Court, shall pay the necessary postage for its return ; and if money is collected on an execution, it shall be the duty of the collecting officer to pay the expense of returning it to the Clerk of this Court and make said expense a part of his commissions.

ORDER OF BUSINESS.

9. The business of each circuit will be taken up and disposed of by counties in the order in which they stand on the docket. The entire business of each county will be disposed of when such county is called before proceeding to the business of the other counties of the circuit.

10. There will be one call of the docket of each county of every circuit. On that call every cause will be tried or continued. The law causes will be disposed

of before the equity causes are called, and so of the equity causes before the State causes are called. State causes in counties will be taken up immediately after the civil docket has been tried.

11. All causes in which one, and not more than two, of the Judges are incompetent, will be tried by the other Judges, with the consent of the parties; but if a majority of the Judges of the Court do not agree, and in cases where more than two are incompetent, and when counsel do not consent, such causes will be certified to the Governor for Special Judges.

12. In the case of death or marriage of any party to a cause pending in this Court, making a revivor necessary, and no motion being made by the party entitled to revive by motion, as now provided by law, the cause may be revived by *scire facias* or bill of revivor, as in chancery cases, or by publication, as hereinafter provided.

13. If it shall appear by the return of the Sheriff upon the *scire facias*, or upon the subpoena under the bill of revivor, that any defendant therein is not to be found, or, if it be shown by affidavit that any of the causes exist which are specified in the first, second, fourth, and fifth subdivisions of § 4852 of the Code as grounds for dispensing with personal service of process, the Court in term time, or Clerk in vacation, may make an order requiring such party to appear at a time specified, and show cause why the suit should not be revived against him or her, a copy of which order shall be published for four consecutive weeks in some newspaper published at the place where the order is made, or in such other paper as the Court or Clerk may order.

14. Writs of *scire facias* to revive, or against bill in State cases, subpoenas upon bills of revivor, and orders of publication, if issued or made in terms, may be made returnable as the Court may direct; if issued or made in vacation, for purposes of revivor, such writs or

orders of publication may be made returnable to the first day of the next term, or to any specified rule day in vacation; and, in the latter case, after due publication or service of the writ, if no defense be made, or cause shown against the revivor, the Clerk may, at any rule day in vacation succeeding such return day, enter an order reviving the cause.

15. The first Monday of every month shall be a rule day; and the Clerk shall keep a rule docket, in which he shall enter all orders made under these rules.

16. The Clerk shall keep a motion docket, on which shall be entered all motions which are made in Court, and not at once disposed of. Thursdays and Fridays shall be motion days, when motions may be made, and the motion docket called. All motions not disposed of when made shall be entered on the minutes and on the motion docket, and notice thereof immediately be given to opposite counsel. Motions shall be disposed of only on written briefs.

17. Petitions for rehearing, before being presented to the Court, will be furnished to the opposite counsel; and after both sides have prepared briefs, the record, together with the petition and briefs, will be presented to the Court without argument. If the Court determines that the cause shall be reheard, the counsel will be notified, and the point or points on which reargument is desired will be indicated, and the time for the reargument designated. But petitions for rehearing must, in all cases, be presented to the Court within ten days after the opinion in the case which is sought to be re-examined, except decisions made within last ten days of the term, and, in such cases, the petitions must be presented as soon after the decisions are made as practicable. No such petitions will be received on the last day of the term.

18. All decrees of the Court will be executed by its own Clerks, unless otherwise ordered by the Court.

BAR RULES.

19. The reading of the transcript will be dispensed with preceding the argument of causes, but counsel, in argument, may refer to and read such parts of the record as may be necessary to illustrate or establish the points made and relied on.

20. The counsel for appellant or plaintiff in error in all civil causes shall file with the Clerk of the Court, at least ten days before the call of the county from which the cause comes, a written or printed brief, which shall be attached by the Clerk to the transcript. If the record be filed at so late a date as not to permit the brief to be filed for the time required before the hearing, then such brief may be filed at any time after the filing of the transcript and before the cause is called for argument. This brief shall contain, in the order herein stated :

(1) A statement of what the case is, and the precise points raised by the pleadings, with such reference thereto as may be necessary; the substance of the verdict and judgment thereon, or judgment without verdict, or decree, with reference to pages of transcript whereon each appears.

(2) A statement of the errors of fact or law relied upon to reverse or modify same; and in case it is an error of fact, the brief shall refer to the evidence relied on to show it, citing pages of record on which it appears. In case it be an error of law, the proposition of law relied on shall be stated, and following such propositions the authorities relied on to sustain the same shall be cited. All points of fact and law thus relied on shall be so stated, and all authorities relied on cited; but counsel will not be confined to the authorities cited, nor required to cite when there are none known to counsel.

(3) When the error is the action of the Court upon a preliminary motion, demurrer, or plea, the substance

of such motion, demurrer, or plea shall be stated, and the action of the Court thereon, citing the pages of transcript where same appears. When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected, with citation of record where the evidence and ruling may be found. When the error alleged is to the charge of the Court, the specification shall set out the part referred to, whether it be instructions given or instructions refused, citing pages of transcript. When the error is to a ruling upon the report of a Master, the brief shall set out the exception to the report, and the ruling of the Court thereon, so that it may plainly appear; and if it be a question of fact, upon which Master and Chancellor have concurred or disagreed, shall so state.

(4) When appellants or plaintiffs in error fail or refuse to file a brief as required by this rule, it will be taken as an abandonment of the appeal or writ of error, as the case may be. Errors not specified according to this rule will be treated as waived, but the Court, at its option, may notice an error overlooked by counsel.

(5) The counsel for a defendant in error or appellee shall file with the Clerk of the Court, at least three days before the calling of the cause (if the record is filed in time; if not, then at any time before the calling of the cause), a brief in support and defense of the judgment or decree assailed. This brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that already filed is controverted.

21. The briefs will not be required to be read, but may be; but all argument made thereon or therefrom shall be entirely oral or entirely written. Counsel will be permitted to present their arguments orally or in writing, as they prefer, but they shall be confined to

one or the other mode of argument, and to one hour's time to the side in which to make it, except when otherwise ordered by the Court in advance of trial. A written argument, however, will not supersede the necessity of a brief.

22. The reading of books or reports of opinions in Court is not allowed. Counsel will be permitted to quote therefrom as desired, but the reading will not be permitted unless demanded by the Court. When thus called for, no comments during the reading will be allowed, but such comment, if any, shall precede or follow the reading.

23. The briefs of counsel shall be written in a large and legible handwriting, with black ink and upon law paper, or printed or type-written. References to textbooks or books of reports shall be to the side paging, if any; but if none, then to the top paging, except that in respect to books which treat of subjects by sections.

24. Not more than two counsel shall be heard on each side of a cause. This rule may be relaxed in special cases on application to the Court. Other counsel, if any, can file briefs or written arguments.

25. Counsel may present decrees at any time when the Court is not engaged in hearing a cause; but decrees about which counsel do not differ may be entered without being presented to the Court. The decrees and judgments will be prepared by counsel of the successful party, and submitted to counsel on the other side. In the event of disagreement about same, the party disagreeing shall note objections in writing, and these, with decree or judgment prepared, and such briefs as counsel on either side may desire to present therewith, will be handed in to the Court, when the decree or judgment will be examined and corrected, if necessary, or further instructions given counsel. If found correct, it will be given to the Clerk, with order to enter it.

26. Suggestions of diminution of record shall be made before the cause is called for trial, and at such time as gives opportunity to have the record perfected for the hearing, or the imperfection of the record will be waived; *Provided, however,* That any amendment thus supplied, brought before the Court before the cause is finally disposed of after hearing, may be considered.

27. On presenting records to one of the Judges, or to the Court in term time, for writs of error or writs of error and *supersedeas*, a petition must accompany it, containing the brief to be used on trial, and attached to record; accompanied also by copy of notice served on opposite party or counsel, or such reasons given for absence thereof as the Court or Judge deems sufficient to excuse party from giving notice.

28. It is ordered by the Court that the Clerk of this Court furnish Clerks of inferior Courts with copies of the rules of this Court from two to seven, both inclusive. Hereafter these rules will be strictly enforced, and a penalty for a failure to comply will be visited on the Clerk so failing. A copy of this order will accompany the rules.

29. It is ordered by the Court that the Clerk promptly record the written opinions delivered by the Court, and that he shall not suffer them to be taken from his office until they are recorded.

All other written rules of this Court, except so far as embraced herein, are revoked.

THIS JUNE 12, 1891.

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